Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

BARKLEY SEED, INC. d/b/a PACIFIC SOUTHWEST SEED & GRAIN, INC.,

Petitioner,

vs.

BOTELHO SHIPPING CORP., ASEAN CHARTERING CO., LTD., FAIRMONT SHIPPING (H.K.) LTD., and SINGCO MARITIME S.A.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a tort cause of action can be stated in admiralty if the only damages sought are economic.

LIST OF ALL PARTIES

Barkley Seed, Inc. d/b/a Pacific Southwest Seed & Grain, Inc., *petitioner*

Barkley Seed, Inc. is the parent company of Pacific Southwest Seed & Grain, Inc. Neither has any nonwholly owned subsidiaries.

Assignee:

The National Seed & Agricultural Service Company

Parent and Nonwholly Owned Subsidiaries:

None

Botelho Shipping Corp., *respondent*

Asean Chartering Co., Ltd., *respondent*

Fairmont Shipping (H.K.) Ltd., *respondent*

Singco Maritime S.A., *respondent*

Based on the corporate disclosure statement made by the respondents pursuant to Fed. R. App. P. 26.1 in the appeal below, respondents have no parent companies or nonwholly owned subsidiaries.

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CITATIONS OF OPINIONS AND ORDERS

The Ninth Circuit affirmed without published opinion. *Barkley Seed, Inc. v. Cormorant Bulk Carriers,* 100 F.3d 961 (9th Cir. 1996). The Ninth Circuit's memorandum opinion appears at 1996 U.S. App. LEXIS 27823 and in Appendix A.

JURISDICTION

The memorandum and order of the Court of Appeals was entered on October 24, 1996. A timely petition for rehearing with suggestion for rehearing en banc was filed on November 6, 1996. An order denying the petition for rehearing was issued on December 6, 1996, and this petition for certiorari was filed within 90 days of that date. This Court has jurisdiction to review this case on a writ of certiorari under 28 U.S.C. § 1254(1). This is an admiralty and maritime claim within the meaning of Fed. R Civ. P. 9(h), and jurisdiction in the district court was based on 28 U.S.C. § 1333(1).

STATUTES INVOLVED

This petition seeks the resolution of a conflict among the circuits on a matter of federal maritime law. No statutes are involved.

STATEMENT OF THE CASE

This case results from the negligence of a shipowner and ship manager, whose inadequate maintenance and management of their ship and indifference to the time-sensitive nature of her cargo seriously delayed a shipment of wheat seed and cost two companies substantial economic damages and a loss of market position in the Kingdom of Saudi Arabia. It raises the question of whether a cause of action can be stated in admiralty to recover losses of an economic nature.

Petitioner Barkley Seed, Inc. d/b/a Pacific Southwest Seed & Grain, Inc. ("Barkley"), an Arizona corporation, sold 15,001 metric tons of specially treated wheat seed to its assignee, the National Seed & Agricultural Service Company of Saudi Arabia ("National Seed"). The latter bought the seed

under an irrevocable letter of credit that required Barkley to deliver, by October 10, 1988, negotiable bills of lading reflecting that the seed had been loaded aboard a ship at Long Beach, California for delivery to National Seed at the Port of Dammam, Saudi Arabia. This shipment date was required to ensure that the seed arrive by the November 15 importation deadline prescribed by the Kingdom of Saudi Arabia.[1] Based on the exigencies of desert agriculture, this deadline was meant to ensure that the seed would be distributed to hundreds of Saudi wheat farmers in time to be planted for optimal seasonal yields in the Arabian peninsula's unforgiving climate.

Barkley hired a Canadian company called Cormorant Bulk Carriers ("Cormorant"), with whom it had dealt successfully in sending several prior shipments of seed to Saudi Arabia, to place a suitable vessel at the Port of Long Beach by September 25, 1988 to load Barkley's shipment and convey it to Dammam with due dispatch. Cormorant negotiated a grain charter for the M/V SINGAPORE VICTORY with the ship's disponent owner, a Liberian shell corporation, respondent Asean Chartering Co., Ltd. The ship was in fact provided by respondent Fairmont Shipping (H.K.) Ltd. ("Fairmont"), a Hong Kong ship management company whose vessels had carried other Barkley seed cargoes three times in the past two years.

The charter represented that the SINGAPORE VICTORY would sail at 13 to 14 knots per hour fully laden, and would arrive at Long Beach to load on September 25th. These representations were not fulfilled. At the time she should have been steaming to Long Beach, the ship was undergoing repairs in Sasebo, Japan. She left the shipyard on September 17th, too late to reach Long Beach in time at optimum speed. In fact, she barely averaged eight knots sailing light, without cargo, from Japan to California. Fairmont revised the arrival date to October 5th, but did not get the ship to Long Beach until October 14th. The SINGAPORE VICTORY arrived with

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[1] Trial Transcript, Feb. 9, 1995, at 128:11-24.

inoperable cranes and could not load the cargo. Petitioner had to rent lower-capacity shore cranes to do the job, and this extended the loading time from three days to six. When the fully laden ship cast off from the dock, she was unfit to sail and had to spend two days in the Los Angeles anchorage while her crew labored over her deficient engines. She finally left port on October 22, almost a month late. The voyage from Long Beach to Dammam usually takes about 30-35 days. The SINGAPORE VICTORY needed 47 days to reach Dammam. She lost 16 days of sailing time to her inconstant engines, and another day stopping enroute at Singapore to have her cargo cranes certified. Without certified cranes, she would not have been allowed to enter Dammam harbor. The SINGAPORE VICTORY finally reached Dammam on the evening of December 7th, 73 days after she had been promised in Long Beach. Such was the ship's condition that within three years after this voyage she was sold for scrap and destroyed. At the time of her demise as well as of this voyage, the SINGAPORE VICTORY was registered in two countries, in violation of the prohibition against dual registration contained in the Convention on the High Seas.[2] In The Philippines her registered owner was respondent Botelho Shipping Corp.; in Panama she was registered to respondent Singco Maritime S.A. Petitioner was unaware of the ship's illegal dual registration as well as of her desperate condition.

Based on the original arrival and loading date of September 25th, Barkley produced and bagged 15,001 metric tons of wheat seed, treated to the particular requirements of National Seed, and trucked it from Arizona over the course of several weeks to Cormorant's Long Beach dock, where it covered more than 20 acres.[3] Barkley had chemically treated the seed to meet the special phytosanitary and horticultural requirements of the Kingdom of Saudi Arabia. There was but one market in the world for seed of this particular chemical

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[2] 13 U.S.T. 2312, arts. 5, 6.

[3] Trial Transcript, Feb. 9, 1995, at 139:11-24.

profile: Saudi Arabia.[4] There was but one buyer in that market with the necessary license to import this shipment: Barkley's customer, National Seed. There was but one season in which National Seed was permitted to import this shipment: November 1988. Asked what Barkley could have done with 20 acres of bagged seed, valued at over $8 million,[5] had the ship never come or had National Seed cancelled its contract for late performance, Barkley's vice-president answered at trial that, "It would have sat and deteriorated and been useless,"[6] and petitioner would have gone bankrupt.[7]

To avert such a loss, Cormorant, with the cargo in its possession on the dock, issued bills of lading dated September 25th for two-thirds of the tonnage and September 30th for the remaining third,[8] fully expecting the ship would arrive in time to load and reach Dammam by the import deadline imposed by the Kingdom of Saudi Arabia. Considering the delays occasioned by the ship's lateness, the royal government made what accommodation it could by extending the deadline to November 20th, the latest feasible date for entering the seed and distributing it to the majority of farmers in time for planting. On October 10th, the letter-of-credit deadline, Barkley endorsed Cormorant's bills of lading and sent them to National Seed, so as not to fail under the letter. With bankruptcy as its only alternative, Barkley gambled that the ship would shortly arrive at Long Beach,[9] load in the three days that shipments of this size typically require, and reach Dammam, after a voyage of 30 days, before November 20th. The gamble failed. The ship did not dock at Long Beach until October 14th, too late to load by October 10th. Because the ship was late, the seed was still on the dock when National

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[4] *Id.* at 115:1-14.

[5] *Id.* at 134:25-135:7.

[6] *Id.* at 141:16-25.

[7] *Id.* at 135:18-23.

[8] *Id.* at 142:9-143:16.

[9] *Id.* at 153:9-154:16.

Seed received the Cormorant bills of lading. Respondents made much of this fact, which they labelled a fraud,[10] while ignoring their own decisive rôle in bringing Barkley to the brink of ruin.

Instead of loading by October 10th and reaching Dammam in 30 days, or even loading within three days after her October 14th arrival and reaching destination before the November 20th import deadline, the SINGAPORE VICTORY did not tie off at the dock in Dammam until the night of December 7, 1988. This late arrival worked enormous consequences on National Seed. As fully two-thirds of the 15,001 metric tons of seed had to be delivered against contracts to Saudi farmers before the ship's arrival, National Seed bought up as much seed of comparable specifications as could be found in the kingdom and covered the rest of its needs by paying for the chemical treatment of grain to convert it to plantable seed. It delivered the cover seed to customers in the central growing regions who could not await the distribution of seed from the tardy SINGAPORE VICTORY, and mitigated its damages by persuading the royal government to permit late delivery of the 5,001 tons of seed that was earmarked for northern Saudi farmers, whose longer planting window enabled them to plant a few weeks later and still anticipate optimal yields. National Seed thus was able to utilize one-third of the SINGAPORE VICTORY's cargo and thereby reduced its cover requirements to 10,000 tons.

The damages sought are primarily those of National Seed, which assigned its claims to petitioner Barkley. The damages consist of the actual expenditures for cover seed and for storing the redundant 10,000 tons of seed that came too late from the holds of the SINGAPORE VICTORY, and the profits lost from the subsequent sale of redundant seed on a glutted market at lesser prices than National Seed would have

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[10] Prior to the trial, the court dismissed the counterclaims in which respondents contended that Cormorant's bills of lading were fraudulent. Barkley Seed, Inc. v. Cormorant Bulk Carriers, 1992 A.M.C. 1627 (C.D. Cal. 1991).

had by delivering it timely against its contracts. National Seed was, moreover, penalized by the Kingdom of Saudi Arabia for failing to comply with its import license. The royal government slashed the company's market share for the 1989 season and awarded the difference to National Seed's competitors. Barkley partially indemnified National Seed and took an assignment of its rights against respondents, which it coupled with its own claims for indemnity and lost sales volume. The total damages claimed by Barkley in its own right and as National Seed's assignee are $4,430,992.36, not counting interest and costs. Petitioner's claim is a tort claim. The district court held that there was no privity of contract between petitioner and respondents because the latter were not bound by Cormorant's bills of lading.

Barkley's forced gamble succeeded in one respect – by mitigating everyone's damages. Barkley's acceptance and endorsement of the bills in the hope that the ship would perform timely cut the overall damages by more than half. Had the letter of credit expired and National Seed cancelled the contract, petitioner would have been forced to send $8 million worth of seed to a landfill, and National Seed would have had to cover for 15,001, not 10,000, tons of seed.

Barkley began this suit in the Central District of California in 1989. A year later the court entered a default judgment against Cormorant for $3 million. That judgment was not final under Fed. R. Civ. P. 54(b) until March 1995, when the district court held that, under *Robins Dry Dock & Repair Co. v. Flint*,[11] Barkley was barred as a matter of law from recovering economic damages in the absence of physical damage. Cormorant is now in bankruptcy and the default judgment is uncollectible.

The Ninth Circuit affirmed, citing as precedent a case it decided a few months before the oral argument in this case. So fresh was that precedent on the identical question of economic damages that the panel issued its decision in this case in memorandum form. The district court and the Ninth

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[11] 275 U.S. 303 (1927).

Circuit have held that respondents are not liable because economic damages are not recoverable in admiralty as a matter of law. The effect of this rule is that a tortfeasor has no duty of care to avoid causing economic injury to others. This rule effectively eliminates the claim of every plaintiff who seeks redress for economic damages in every admiralty and maritime case filed in five of the eight federal circuits that have ruled on the question.

REASONS FOR GRANTING THE PETITION

A. The Ninth Circuit Court of Appeals Has Entered a Decision in Conflict with the Decisions of Other United States Courts of Appeals on the Same Important Matter.

The question presented for review is a question of federal maritime law solely within the original and exclusive jurisdiction of the United States district courts.[12] The question presented for review has been decided in eight of the federal circuit courts of appeals, and they have divided on the answer five to three. This Court denied petitions for certiorari to five of the circuits deciding the question (two for and three against) in 1965, 1981, 1982, 1984 and 1986, and in its last comment on the subject, in *East River S.S. Corp. v. Transamerica Delaval, Inc.*,[13] this Court expressly reserved the question presented for review.[14] Because this question is the subject of an intercircuit conflict involving eight of the federal circuits, and is of great importance in the federal maritime law, petitioner asks the Court to grant this petition and answer the question reserved in *East River*: whether a tort cause of action can be stated in admiralty if the only damages sought are economic.

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[12] Judiciary Act of 1789, 1 Stat. 76-77 (1789) (codified at 28 U.S.C. § 1333(1)).

[13] 476 U.S. 858 (1976).

[14] *Id.* at 871 n.6.

Three of the circuits – the Second, Fourth and Sixth – have answered the question in the affirmative. They allow the recovery in admiralty cases of purely economic damages that were foreseeable and were proximately caused by the breach of a duty of care.[15] Five other circuits – the First, Third, Fifth, Ninth and Eleventh – deny the recovery in admiralty cases of economic damages that were not caused directly by physical damage.[16] There has been a serious division of opinion within circuits as well as between them. Notable dissents were filed in the Third and Fifth Circuit cases that barred claims for economic damages.[17] Sharp divisions emerged from *en banc* rehearings in the Fifth and Eleventh Circuits.[18] The Eleventh Circuit bars economic damages claims because its tie vote *en*

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[15] In re Kinsman Transit Co., 338 F.2d 708 (1964), *cert. denied sub nom.* Continental Grain Co. v. City of Buffalo, 380 U.S. 944 (1965), *subsequent appeal*, 388 F.2d 821 (2d Cir. 1968); Venore Transp. Co. v. M/V STRUMA, 583 F.2d 708 (4th Cir. 1978); Marine Navigation Sulphur Carriers, Inc. v. Lone Star Indus., 638 F.2d 700 (4th Cir. 1981); In re Bethlehem Steel Corp., 631 F.2d 441 (6th Cir. 1980), *cert. denied*, 450 U.S. 921 (1981). *See* the discussion of this line of cases allowing recovery of economic damages in David R. Owen, *Recovery for Economic Loss Under U.S. Maritime Law: Sixty Years Under* Robins Dry Dock, 18 J. MAR. L. & COMM. 157, 168-70 (1987).

[16] Barber Lines A/S v. M/V DONAU MARU, 764 F.2d 50 (1st Cir. 1985); Getty Rfg. & Mktg. Co. v. MT FADI B, 766 F.2d 829 (3d Cir. 1985) (2-1 decision); Louisiana *ex rel.* Guste v. M/V TESTBANK, 752 F.2d 1019 (5th Cir. 1985) (en banc) (10-5 decision), *cert. denied sub nom.* White v. M/V TESTBANK, 477 U.S. 903 (1986); Channel Star Excursions, Inc. v. Southern Pac. Transp. Co., 77 F.3d 1135 (9th Cir. 1996); Hercules Carriers, Inc. v. Florida, 728 F.2d 1359 (11th Cir.) (en banc) (6-6 decision), *cert. denied*, 469 U.S. 835 (1984).

[17] *Getty*, 766 F.2d at 836 (Mansmann, J., dissenting); *TESTBANK*, 752 F.2d at 1035 (Wisdom, J., dissenting), 752 F.2d at 1053 (Rubin, J., dissenting).

[18] In *TESTBANK* only six of the 15 judges joined the majority opinion while four wrote or joined in concurring opinions. Five joined in one or both of the dissenting opinions. 752 F.2d at 1019-53. In *Hercules* the 12 judges of the Eleventh Circuit were equally divided. 728 F.2d at 1359.

banc was insufficient to overrule a panel decision to bar such claims.[19] Forty-four federal appellate judges have decided the question presented; 23 have voted to bar recovery of economic damages and 21 have voted to allow recovery under the basic tort principles of duty, foreseeability and proximate cause.[20]

Because it addresses fundamental principles in the law of tort and the law of damages, and has such widespread application, the question presented has been the subject of numerous law review articles both within[21] and beyond the context of federal admiralty law.[22]

Troubled by the absolute bar to recovery of economic damages in certain federal circuits, Congress entered the field in 1990 in response to the EXXON VALDEZ oil spill and other spills in New Jersey and California,[23] and created a cause of action for the recovery of economic damages under

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[19] *Hercules*, 728 F.2d at 1359.

[20] *See* Appendix F of this petition for a list of these 44 judges and how they voted on the question presented for review.

[21] *See, e.g.*, Henry D. Gabriel, TESTBANK: *The Fifth Circuit Reaffirms the Bright Line Rule of* Robins Dry Dock *and Fails to Devise a Test to Allow Recovery for Pure Economic Damages*, 31 LOY. L. REV. 265 (1985); Victor P. Goldberg, *Recovery for Pure Economic Loss in Tort: Another Look at* Robins Dry Dock v. Flint, 20 J. LEGAL STUD. 249 (1991); Francis J. Gonynor, *The* Robins Dry Dock *Rule: Is the "Bright Line" Fading?*, 4 U.S.F. MAR. L.J. 85 (1992); Owen, *supra* note 15; James W. Shephard, *The Murky Waters of* Robins Dry Dock*: A Comparative Analysis of Economic Loss in Maritime Law*, 60 TUL. L. REV. 995 (1986).

[22] *See, e.g.*, Roger B. Godwin, Comment, *Negligent Interference with Economic Expectancy: The Case for Recovery*, 16 STAN. L. REV. 664 (1964); Fleming James, Jr., *Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal*, 25 VAND. L. REV. 43 (1972); J.C.S., Note, *Negligent Interference with Contract: Knowledge as a Standard for Recovery*, 63 VA. L. REV. 813 (1977); Robert L. Rabin, *Tort Recovery for Negligently Inflicted Economic Loss: A Reassessment*, 37 STAN. L. REV. 1513 (1985).

[23] Pub. L. 101-380, 1990 U.S. CODE CONG. & ADMIN. NEWS 722.

the Oil Pollution Act of 1990 ("OPA '90").[24] The act permits any "subsistence user" of a navigable waterway to recover purely economic damages in the absence of a proprietary interest.[25]

Because the Oil Pollution Act of 1990 does not apply retroactively,[26] it affords no relief to the myriad claimants with economic damages spawned by the EXXON VALDEZ spill. Reluctantly viewing those claims (except for fishermen) as barred by *Robins*, the court for the District of Alaska certified for interlocutory appeal the question of whether the federal maritime law allows a claim for purely economic loss.[27] The Ninth Circuit did not decide the issue. Faced with its own negative circuit precedent in *Barber Lines A/S v. M/V DONAU MARU*,[28] a First Circuit panel recently circumvented the *Robins* bar to recovery by resolving, through a deft blend of acumen and casuistry, that the federal maritime law does not preempt a Rhode Island statutory cause of action for economic losses caused by negligent pollution.[29]

Five of the eight circuits to address this question hold that a cause of action cannot be stated in admiralty if the damages sought are economic only. These circuits all base their decision on an expansive reading of this Court's opinion in *Robins*, the 1927 case of a ship charterer's claim for damages from a tortfeasor whose negligence caused the loss of use of the ship. In a typically terse decision, Justice Holmes wrote that the charterer's loss stemmed from its contract with the owner for the use of the ship, not from the

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[24] 33 U.S.C. §§ 2701-2761 (1994).

[25] *Id.* at § 2702(b)(2)(C).

[26] *Id.* at § 2751(d).

[27] In re The EXXON VALDEZ, 767 F. Supp. 1509, 1517-18 (D. Alaska 1991).

[28] 764 F.2d 50 (1st Cir. 1985).

[29] In re Ballard Shipping Co., 32 F.3d 623, 629-31 (1st Cir. 1994) (distinguishing *Barber* based in part on the congressional intent in passing OPA '90, 1990 U.S. CODE CONG. & ADMIN. NEWS 722).

repairman's tort that frustrated the contract.[30] Characterizing the claim as one for negligent interference with contract, Justice Holmes explained that "a tort to the person or property of one man does not make the tortfeasor liable to another merely because the injured person was under a contract with that other unknown to the doer of the wrong. . . . The law does not spread its protection so far."[31] The charterer was not a third-party beneficiary of the owner's contract with the repairer[32] and had no proprietary interest in the ship.[33] He thus lacked standing to sue the negligent repairer.

Significantly, *Robins* did not decide a number of issues:[34] (1) Whether traditional tort analysis, based on duty, foreseeability and proximate cause, is inapplicable in the absence of physical damage or the absence of a proprietary interest in the thing damaged. (2) What reasons of public policy require that the courts dispense with basic tort law in admiralty? (3) Whether a claimant can recover for loss of use of property in which he has no proprietary interest. (4) Whether recovery is denied only for loss of future profits, or for all economic losses, including expenses incurred because of the tort.[35] (5) Whether the charterer could have recovered its economic loss if the ship repairer had known of the charter party.[36]

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[30] 275 U.S. at 308.

[31] *Id.* at 309.

[32] *Id.* at 307.

[33] *Id.* at 308.

[34] *See* Owen, *supra* note 15, at 159-60.

[35] The Fourth Circuit, for example, allows a charterer, absent a proprietary interest in the vessel, to recover the expenses caused by a tortfeasor's negligence. Venore Transp. Co. v. M/V STRUMA, 583 F.2d 708 (4th Cir. 1978).

[36] The question of foreseeability plays an important part in *Robins* which has been largely overlooked in the jurisprudence. *Robins* points out no fewer than three times that the repairer had no notice of the charter, a fact that would have been of negligible relevance if, as the majority of circuits supposes, proprietary interest in the ship was the *sine qua non* of recovery. 275 U.S. at 307, 308, 309.

Robins was first applied to deny a maritime claim for economic damages in *Borcich v. Ancich*,[37] a Ninth Circuit case involving fishermen's claims for wages lost while their vessel, damaged in a collision, was laid up for repairs. Their claims were dismissed under *Robins* because they had no proprietary interest in the vessel.[38] Two years later the Ninth Circuit thought better of this result and overruled it in *Carbone v. Ursich*,[39] a case of claims by fishermen for wages lost when another vessel fouled and damaged their nets. Although the nets were not the claimants' property, the panel overruled *Borcich*,[40] distinguished *Robins*, and held that fishermen are specially-protected wards of the admiralty whose "economic interests [are] entitled to the fullest possible legal protection."[41]

Following this retreat, the next case to use *Robins* as the basis for denying an admiralty claim for purely economic damages appears to be *Kaiser Aluminum & Chemical Corp. v. Marshland Dredging Co.*[42] The Fifth Circuit denied Kaiser's economic damages from a plant shutdown caused when a dredge negligently severed an underwater pipeline that supplied the plant with natural gas. Economic losses similarly were denied in scattered Fifth Circuit cases over the next decade. Shortly after spinning off from the Fifth, the Eleventh Circuit applied this rule in *Kingston Shipping Co. v. Roberts*[43] in 1982. When another panel followed *Kingston*, the Eleventh Circuit decided to rehear the case *en banc*. The twelve circuit judges were evenly divided, so the precedent stood.[44]

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[37] 191 F.2d 392 (9th Cir. 1951).

[38] *Id.* at 398.

[39] 209 F.2d 178 (9th Cir. 1953).

[40] *Id.* at 183.

[41] *Id.* at 182.

[42] 455 F.2d 957 (5th Cir. 1972).

[43] 667 F.2d 34 (11th Cir.), *cert. denied*, 458 U.S. 1108 (1982).

[44] Hercules Carriers, Inc. v. Florida, 728 F.2d at 1359.

At about the same time, the Fifth Circuit held an *en banc* rehearing of *TESTBANK* to address the same question. That rehearing produced a sharply divided court and a painstakingly reasoned dissent by Judge Wisdom.[45] The Fifth Circuit expanded the *Robins* analysis beyond the fact pattern of unforeseen contracts, and applied it to mass torts. The case arose from a collision between the M/V TESTBANK and the M/V SEA DANIEL in the Mississippi River Gulf Outlet, a navigable waterway affording the only deep-draught access to the container terminals in the Port of New Orleans. A container carrying pentachlorophenol ("PCP") fell off the TESTBANK's deck, dumping 12 tons of PCP into the water and prompting the Coast Guard to close the outlet. Economic losses were claimed by "shipping interests, marine and boat rental operators, wholesale and retail seafood enterprises not actually engaged in fishing, seafood restaurants, tackle and bait shops, and recreational fishermen."[46] The Fifth Circuit announced a "bright-line rule" for determining which claims were proximately and foreseeably caused by the collision: All save the fishermen's claims were barred by the rule of *Robins*.[47]

The Fifth Circuit is the source of the majority trend of denying economic damages claims in admiralty under a *Robins* analysis. It also is the source of the modern expansion of *Robins* from its focus on negligent interference with contract to its current application to mass torts in which, for many claimants, contracts play no part. The mitotic division of the Fifth Circuit spread its view of *Robins* to the Eleventh, and together these circuits, in spite of deep divisions in their *en banc* deliberations, had by 1985 eliminated all maritime causes of action for economic damages (except for fishermen) from Brownsville, Texas to Savannah, Georgia.

On the heels of *TESTBANK*, the First and Third Circuits quickly joined the *Robins*-expansionist movement. The First

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[45] Louisiana *ex rel.* Guste v. M/V TESTBANK, 752 F.2d 1019; *see id.* at 1035 (Wisdom, J., dissenting).

[46] *Id.* at 1020-21.

[47] *Id.* at 1022-23.

Circuit adopted *TESTBANK*'s expanded reading of *Robins* in *Barber Lines A/S v. M/V DONAU MARU*,[48] a case in which an oil spill obstructed the use of a dock and caused economic losses. The panel found the facts "strikingly similar" to those of *Robins*: both defendants had been negligent, both injuries probably were foreseeable, and both losses were "purely financial, without accompanying physical harm to person or property."[49] Judge Breyer explained that negligent tortfeasors need not compensate their victims for purely economic losses, and rejoined the *TESTBANK* dissenters for their contention that courts should decide such cases under the principles of foreseeability and proximate cause.[50] According to *Barber*, the absolute bar to recovery of economic damages was "supported by plausible considerations of tort policy," and the *Barber* appellants had given no convincing reasons for the "creation of any new exception or class. . . ."[51] For policy reasons the *Barber* panel chose to follow the Fifth Circuit's expansion of *Robins* rather than the Second Circuit's tort analysis in *Kinsman Transit*.[52]

A tanker disabled by cracks in her deck and hull was unable to discharge her cargo safely, blocking the use of a private dock, and thereby provided the factual predicate for the Third Circuit's joinder to the *Robins* movement in *Getty Refining & Marketing Co. v. MT FADI B*.[53] The panel majority adopted the reasoning of the *TESTBANK* majority, and

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[48] 764 F.2d 50 (1st Cir. 1985).

[49] *Id.* at 51.

[50] *Id.* at 56-57.

[51] *Id.* at 57. A First Circuit panel faced with the precedent of *Barber* circumnavigated the *Robins*-expansionist bar to economic recovery by concluding that the general maritime law did not preempt a Rhode Island statute that created a cause of action for economic damages. In re Ballard Shipping Co., 32 F.3d at 629-30.

[52] 764 F.2d at 52-53. These policy reasons did not deter the First Circuit panel that avoided *Barber*'s application of *Robins* in *Ballard*. 32 F.3d at 629-30.

[53] 766 F.2d 829 (3d Cir. 1985) (2-1 decision).

announced that a tortfeasor is liable for economic damages only if his negligence causes physical injury, because "the physical injury forms the basis of a tort independent of any contractual interests and recovery is subject to the usual rules governing liability for negligence."[54] Judge Mansmann wrote in dissent that she "would rely on traditional tort principles rather than the bright line rule advocated by the majority."[55] *Robins*, she pointed out, does not support a "bright-line rule" against recovery of purely economic loss.[56] Judge Mansmann believed that the majority understood *Robins* to hold that though there is a duty not to cause physical harm, there is no corresponding duty not to cause economic harm.[57] She noted that "the Second Circuit rejected outright the bright line approach, 'prefer[ing] to leave the rock-strewn path of "negligent interference with contract" for more familiar tort terrain.' "[58]

When petitioner's claim was filed in the district court, and when its appeal was briefed, the Ninth Circuit held a different view than it does today. In *Union Oil Co. v. Oppen*,[59] arising from the 1969 Santa Barbara oil spill, the Ninth Circuit held that the law of admiralty recognizes "a claim for economic loss, unaccompanied by any physical injury to the person or property of the claimant."[60] *Oppen* based this conclusion on *Aktieselskabet Cuzco v. The SUCARSECO*,[61] written eight years after *Robins*. There, this Court allowed the owners of cargoes aboard one of two ships in collision to recover indemnity from the other ship for the general average contributions

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[54] *Id.* at 833.

[55] *Id.* at 836 (Mansmann, J., dissenting).

[56] *Id.* at 836-37 (Mansmann, J., dissenting).

[57] *Id.*

[58] *Id.* at 839 (Mansmann, J., dissenting) (quoting *Kinsman Transit*, 388 F.2d at 824).

[59] 501 F.2d 558 (9th Cir. 1974).

[60] *Id.* at 569.

[61] 294 U.S. 394 (1935).

they had been required by contract to pay to the vessel carrying their cargoes.[62] In *Oppen*'s words, this Court "recognized that the right of the cargo owners to have their general average contribution restored sprang directly from the tort and was in no sense derivative or parasitically dependent upon the presence of physical injury."[63]

After more than 20 years of *Oppen*, the Ninth Circuit retreated from this interpretation just months before oral argument of the appeal below. In *Channel Star Excursions, Inc. v. Southern Pacific Transportation Co.*,[64] a Ninth Circuit panel discarded *Oppen*'s conviction that admiralty law permits the recovery of economic damages absent physical injury. *Channel Star* tried to explain away *Oppen*'s unequivocal statement of the law in admiralty by suggesting that the case had been controlled by California law rather than maritime law.[65] *Channel Star* concluded that *Robins* bars negligence claims for economic losses absent physical damage,[66] and determined that this bar is "strictly observed" in the federal maritime law.[67] Without citing specific cases, *Channel Star* claimed that the Second and Fourth Circuits strictly observe the *Robins* bar.[68] On this critical point, *Channel Star* is wrong. The Second, Fourth and Sixth Circuits do not strictly observe the *Robins* bar; they allow recovery under a basic tort analysis.[69]

In the *Kinsman Transit* cases, the Second Circuit declined to apply *Robins* to negligence claims in admiralty, and adopted

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[62] *Id.* at 404.

[63] 501 F.2d at 567 (citing *The SUCARSECO*).

[64] 77 F.3d 1135.

[65] *Id.* at 1138 (distinguishing *Oppen*). Why, then, did the *Oppen* court devote such attention to federal maritime law?

[66] *Id.* at 1137-38.

[67] *Id.* at 1138.

[68] *Id.*

[69] *See* cases cited *supra* note 15 and the commentary on this line of cases in Owen, *supra* note 15, at 168-70, and in Shephard, *supra* note 21, at 1009-10 & nn. 75-84.

the tort principles of duty, foreseeability and proximate cause, deciding each claim for economic damages on its merits.[70] In *Venore Transportation Co. v. M/V STRUMA*,[71] the Fourth Circuit distinguished *Robins* and allowed a time-charterer to recover its out-of-pocket expenses from the tortfeasor who negligently damaged the ship it had chartered. Later, in *Marine Navigation Sulphur Carriers, Inc. v. Lone Star Industries*,[72] the Fourth Circuit rejected the applicability of *Robins* and adopted the Second Circuit's reasoning in *Kinsman Transit*. *Channel Star* also overlooked the Sixth Circuit's decision in *In re Bethlehem Steel Corp.*,[73] which expressly adopted the *Kinsman Transit* approach. *Bethlehem Steel* dealt with economic damages caused when a U.S. ship struck a highway bridge spanning Canadian waters. "We conclude," the Sixth Circuit wrote, "that there is no absolute rule either in Canada or in the United States which forbids recovery for economic loss where the claimant has suffered no physical injury."[74]

These three circuits do not follow the Fifth Circuit's expansionist application of *Robins* to all maritime negligence claims; they apply instead the fundamental tort principles of duty, foreseeability and proximate cause, an approach that finds its source in the Second Circuit's twin decisions in *Kinsman Transit*.

Kinsman Transit is a textbook case.[75] It appears in several editions of Prosser, *Cases & Materials on Torts*, studied by

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[70] *Kinsman Transit*, 338 F.2d 708 & 388 F.2d 821 (rejecting *Robins*).

[71] 583 F.2d 708 (4th Cir. 1978) (distinguishing *Robins*).

[72] 638 F.2d 700 (4th Cir. 1981) (adopting *Kinsman Transit*).

[73] 631 F.2d 441 (6th Cir. 1980) (adopting *Kinsman Transit*), *cert. denied*, 450 U.S. 921 (1981).

[74] *Id.* at 447-48. *Cf.* Gonynor, *supra* note 21, at 90; Owen, *supra* note 15, at 168-70 (both discussing the Fourth and Sixth Circuits' adoption of the *Kinsman Transit* tort analysis instead of *Robins*).

[75] There are actually two *Kinsman Transit* decisions: In re Kinsman Transit Co., 338 F.2d 708 (2d Cir. 1964) (by Judge Friendly), *cert. denied sub nom.* Continental Grain Co. v. City of Buffalo, 380 U.S. 944 (1965) and In re Kinsman Transit Co., 388 F.2d 821 (2d Cir. 1968) (by Judge Kaufman).

generations of law students who have been schooled since the early 1970s,[76] as representative of the modern view of foreseeability in cases of negligent tort. The case raised the issue of whether George Steinbrenner's shipping company should be liable for economic losses caused in the Port of Buffalo when one of its ships, negligently moored, broke loose and knocked another ship loose from her moorings. The two ships drifted down the Buffalo River, struck a bridge and collapsed it into the river, creating an ice dam that caused upstream flooding and throttled navigation for two months.[77] The Second Circuit adopted for admiralty law the *Palsgraf*[78] approach to tort analysis,[79] noting that the principles of duty, foreseeability and proximate cause allow the courts, on a case-by-case basis, to fairly allocate the risks of negligent conduct.[80] The court rejected the notion that *Robins* had foreclosed on the application of basic tort principles, and stuck to the principle of foreseeability.[81] In Anglo-American law, observed the court, "[e]xcept only the defendant's intention to produce a given result, no other consideration so affects our feeling that it is or is not just to hold him for the result so much as its foreseeability."[82] And " '[i]f the result is out of all proportion to the defendant's fault, it can be no less out of proportion to the plaintiff's entire innocence.' "[83]

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[76] *See, e.g.*, WILLIAM L. PROSSER, CASES & MATERIALS ON TORTS at 321 & 325 (6th ed. 1976) & WILLIAM L. PROSSER, CASES & MATERIALS ON TORTS at 314-16 (8th ed. 1989).

[77] *Kinsman Transit*, 388 F.2d at 822.

[78] Palsgraf v. Long Island R.R., 162 N.E. 99 (N.Y. Ct. App. 1928).

[79] *Kinsman Transit*, 388 F.2d at 824 n.6.

[80] *Id.* at 825.

[81] *Id.* at 824.

[82] *Id.* (quoting Henry W. Edgerton, *Legal Cause*, 72 U. PA. L. REV. 211, 352 (1924) and citing Bradley v. Southern Ry., 320 U.S. 476, 483 (1943)).

[83] 388 F.2d at 823 (quoting PROSSER ON TORTS at 296 (3d ed. 1964)).

In the wake of *Channel Star*, which controlled the panel decision of this case,[84] the circuit conflict now is five to three against a cause of action in admiralty for economic damages. This question has percolated through eight of the 13 federal circuits, and been decided by 44 appellate judges, one of whom now sits on this Court. In view of their specific jurisdiction, the District of Columbia and Federal Circuits are unlikely ever to reach this question. It has been decided by every circuit with a deep-draught port except the Seventh, and is ripe for decision by this Court. The conflict in the circuits and the significance of this issue to maritime commerce speak in favor of a writ of certiorari at this time.[85]

The desired uniformity of admiralty law long favored and espoused by federal courts and admiralty practitioners is rent in two on this question. One rule of law applies in the Ports of New York, Buffalo, Cleveland, Detroit, Baltimore, Norfolk, Wilmington, N.C. and Charleston, while another and contradictory rule of law applies in the Ports of Los Angeles/Long Beach, San Francisco, Seattle, Houston, New Orleans, Savannah, Philadelphia and Boston. Claimants have the right to bring tort actions for economic damages in three circuits and lack that right in five. These inconsistent rights and duties lead to inconsistent results and promote forum-shopping by claimants and tortfeasors alike.

Resolution of this intercircuit conflict requires a choice between the fundamental tort principles applied in the even-numbered circuits and the emphasis of public policy and administrative convenience favored by the odd-numbered circuits. The *Kinsman Transit* cases find that one purpose for the courts' existence is to determine foreseeability and proximate cause.[86] They hold that there is a duty of care not to cause economic harm and believe, as did the dissenters in the majority of circuits, that a bright-line rule against economic recovery

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[84] *See* Barkley Seed, Inc. v. Cormorant Bulk Carriers, 1996 U.S. App. LEXIS 27823 (9th Cir. Oct. 24, 1996), App. at 5-6.

[85] Sup. Ct. R. 10(a).

[86] *Kinsman Transit*, 388 F.2d at 823.

is unfair, unreasonable and contrary to basic tort law.[87] The majority views the tortfeasor's rights as paramount, worries about how to draw the line between proximate economic damages and remoter ones, and falls back on the administrative convenience of a bright-line proscription of all economic claims, proximal and not.[88] The five circuits holding that there is no duty of care to avoid causing economic loss all cite *Robins* as the source of this rule.[89] Resolution of the conflict in the circuits thus entails the decision not only of whether there is a duty of care not to cause economic harm, but also of whether *Robins* provides appropriate authority for the view that there is not.

B. The Ninth Circuit Has Decided an Important Federal Question in a Way That Appears to Conflict with Relevant Decisions of This Court.

A careful reading of *Robins* itself and consideration of this Court's subsequent statements on the question suggest that the majority has taken *Robins* beyond its intended limits. The expansionists may well have decided an important federal question in a way that conflicts with this Court's opinions in *Robins* and in *The SUCARSECO*.[90] We have already seen that *Robins* focused on the fact that the repairer did not know about the charter of the vessel.[91] This aspect of *Robins* was emphasized in *The SUCARSECO*, written by Chief Justice Hughes for a unanimous court that included six of the nine *Robins* justices.[92] Recovery of economic damages was allowed in *The SUCARSECO* even though the sums in question had been paid

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[87] *Kinsman Transit*, 338 F.2d at 725-26; *Kinsman Transit*, 388 F.2d at 823-24.

[88] *See, e.g.*, Barber Lines A/S v. M/V DONAU MARU, 764 F.2d at 57.

[89] *See* cases cited *supra* note 16.

[90] 294 U.S. 394 (1935).

[91] *See supra* note 36.

[92] Devanter, McReynolds, Brandeis, Sutherland, Butler and Stone, JJ.

pursuant to a contract. The cargo owners' share of the general average expenses, which they paid the carrying vessel as required by the bills of lading, "properly belongs in the category of damage which the cargo owners have suffered by reason of the collision."[93] Despite the appearance that *Robins* would bar the recovery of losses caused by negligent interference with contract, this Court allowed recovery, explaining that *Robins* applies when the damages are remote and holding that such "remoteness" was lacking here.[94]

If this Court viewed *Robins* as barring causes of action for purely economic damages, it probably would not have stated that it was not reaching this question in *East River*.[95] In that case, this Court held that a manufacturer does not owe the consumer a duty to prevent a product from damaging itself.[96] In applying landside products liability law to an admiralty claim, the Court took care to emphasize, "We do not reach the issue whether a tort cause of action can ever be stated in admiralty when the only damages sought are economic."[97] This is the question presented for review by this petition.

The importance of this federal question to maritime commerce cannot be overstated. The First, Third and Eleventh Circuit cases that expanded *Robins* to exclude recovery of economic loss involved vessel accidents that blocked access to private dock and terminal facilities – a common occurrence in U.S. ports. *Kinsman Transit* and *TESTBANK* involved the blockage of vessel traffic by ship collisions. The Ninth Circuit's *Channel Star* decision concerned a railroad's habitual obstruction of a navigable river by failing timely to open its drawbridge. The expanded *Robins* doctrine enforced by the majority affects not only navigation and access to marine terminal facilities in those circuits, it also applies to mass toxic torts such as the loss overboard of PCP in the *TESTBANK*

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[93] *The SUCARSECO*, 294 U.S. at 404.

[94] *Id.* at 404-05.

[95] 476 U.S. 858 (1986).

[96] *Id.* at 871.

[97] *Id.* at 871 n.6. *Cf.* Shephard, *supra* note 21, at 1033.

collision and the destruction of major elements of aquatic life in the EXXON VALDEZ oil spill.[98] Some of the EXXON VALDEZ claims already have been dismissed under a *Robins* analysis without consideration of whether the shipowner owed and breached any duties of care.[99] Exxon simply had no duty of care to avoid causing economic harm. A recent example of a mass tort to which *Robins*-expansionism will apply is the calamity that occurred in New Orleans shortly before Christmas 1996 when a ship operated by COSCO (H.K.) Shipping Co. ("COSCO") lost steerage and plowed into The Riverwalk, a large shopping mall built above a dock on the edge of the Mississippi River. Under the Admiralty Extension Act,[100] claims for damage caused by vessels to shoreside structures on navigable waters, such as The Riverwalk complex, are within the original and exclusive admiralty and maritime jurisdiction of the federal courts. The economic damages claims of hundreds of Riverwalk shopkeepers shut down by the collision fall within the Admiralty Extension Act, and must therefore be brought in the limitation concursus COSCO has filed under the Limitation of Liability Act.[101] Under *TESTBANK*'s expansion of *Robins*, the district court in New Orleans will be required to dismiss them.

This petition presents a particularly representative example of the effect of the majority's expansionist view of *Robins*, for it involves the dismissal as a matter of law of a claim for economic damages on the basis that *Robins* denies

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[98] Within the limitations of liability provided by the Oil Pollution Act of 1990, some economic claims arising from oil pollution of navigable waters are now freed from the *Robins*-expansionist rule. *See* 33 U.S.C. § 2702(b)(2)(C).

[99] *In re The EXXON VALDEZ*, 767 F. Supp. at 1517.

[100] 46 U.S.C. § 740 (1994).

[101] 46 U.S.C. §§ 181-189 (1994). The district court dismissed a class action by shopkeepers, entitled Messina's Pasta, Inc. v. COSCO (H.K.) Shipping Co., No. 96-4047 (E.D. La. 1997), and ruled that the shopkeepers must file their claims individually in In re Clearsky Shipping Corp., No. 96-4099 (E.D. La.), the limitation action.

recovery from a shipowner even by those whose cargo was on the ship. Petitioner Barkley and its assignor National Seed were denied a right of redress against the respondents solely because their property was negligently detained from market rather than lost or damaged, resulting in "economic" rather than "physical" damage. So absolute and arbitrary is this proscription of economic damages that the Ninth Circuit and the majority would have been constrained by their own rationale to dismiss petitioner's claim even if the delay had lasted for years, instead of weeks, and even if it had driven Barkley and National Seed out of business, instead of merely costing them $4.5 million. This expansionist *Robins* rule is inconsonant with the basic tenets of tort law and with the policy reasons for imposing duties of care. The results it reaps are particularly inappropriate when, as here, the court holds that those who profit from providing a ship to carry a cargo across the seas have absolutely no duty to avoid causing economic harm by their negligent management and maintenance of the ship and their protracted delay in performance. For support, the Ninth Circuit's ruling that respondents did not owe petitioner and its assignee any duty of care can claim neither reason nor logic; its only prop is the courts' gloss upon, and unwarranted expansion of, *Robins*. When the loss is economic, the Ninth Circuit's bright-line rule takes no cognizance of any relationship that may exist between tortfeasor and victim, even when the tortfeasor's duty is to load and carry the victim's cargo. Unless the damages are "physical" rather than "economic," the owner and manager of the ship may be as negligent as they wish, for in the *Robins*-expansionist view they have no duty of care.

Respondents and petitioner were not in privity, but this does not mean that respondents owed petitioner no duty of care. Tort law did away with the privity requirement 80 years ago.[102] Knowing what cargo the ship was to load and where

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[102] MacPherson v. Buick Motor Co., 111 N.E. 1050 (N.Y. 1916) (Cardozo, J.) (allowing recovery based on negligence absent privity with the tortfeasor).

the ship was to carry it, and having carried similar time-sensitive cargoes for petitioner from Long Beach to Dammam three times before, respondent Fairmont, the SINGAPORE VICTORY's negligent manager, could foresee that economic damages would result if it failed to perform timely and failed to provide a capable ship. Had petitioner been able to sue respondents in the Second Circuit, the court would have followed *Kinsman Transit*, found a duty, found a breach of the duty, found foreseeability, found proximate cause, and gone on to determine damages. Following *Channel Star*'s adoption of the expansionist view of *Robins*, the Ninth Circuit summarily dismissed the claim because petitioner's damages were only "economic."

There is legitimate question as to whether *Robins* ever proscribed the recovery of economic losses in admiralty. That interpretation is difficult to square with this Court's subsequent opinion in *The SUCARSECO*,[103] which considered the rule of *Robins* as one of "remoteness."[104] The expansionist view of *Robins* taken by the First, Third, Fifth, Ninth and Eleventh Circuits is also difficult to square with this Court's statement in *East River* that it would not reach the issue of whether a cause of action can ever be stated in admiralty if the only damages sought are economic.[105] If the *East River* Court had thought the question was answered by *Robins*, surely it would have said so.

Seldom in the law has an incipient doctrine seemed so unpresaged in the words of its forebear. Largely to blame is the opinion's ambiguity. As one critic of the bright-line rule put it, "In *Robins* a great judge, Oliver Wendell Holmes, had

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[103] 294 U.S. 394 (1935).

[104] *Id.* at 404-05.

[105] 476 U.S. at 871 n.6.

an off-day."[106] Based both upon the five-to-three circuit split[107] and the Ninth Circuit's decision of this important admiralty question in a way that appears to conflict[108] with this Court's understanding of *Robins* in *The SUCARSECO*[109] and in *East River*,[110] petitioner respectfully asks this Court to grant review.

C. The Expanded *Robins* Doctrine Is Conceptually Unsound and Conflicts with the Economic Loss Rules Applied in Many U.S. and Foreign Jurisidictions.

The *Robins*-expansionist rule suffers from a number of conceptual difficulties:

1. The majority recognizes a duty of care to avoid causing physical harm but no duty of care to avoid causing economic harm, justifying the elimination of redress for economic loss on grounds of administrative convenience or fear of false claims.[111] *Kinsman Transit* readily dismissed such fears: "Here, as elsewhere, the answer must be that courts have some expertise in performing their almost daily task of

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[106] Louisiana *ex rel.* Guste v. M/V TESTBANK, 728 F.2d 748, 750 (1984) (Wisdom, J., concurring), *aff'd on rehearing en banc*, 752 F.2d 1019 (5th Cir. 1985) (10-5 decision), *cert. denied sub nom.* White v. M/V TESTBANK, 477 U.S. 903 (1986). In a footnote to this trenchant statement, Judge Wisdom explained: "As legal historians have noted, Justice Holmes attempted throughout his career to restrict liability as much as possible. *See* G. Gilmore, *The Death of Contract* at 14-17 (1974). This concern for limiting liability is out of step with contemporary tort doctrine." 728 F.2d at 750 n.2.

[107] Sup. Ct. R. 10(a).

[108] *Id.* 10(c).

[109] 294 U.S. at 404-05.

[110] 476 U.S. at 871 n.6.

[111] Robert L. Rabin, the A. Calder Mackay Professor of Law at Stanford Law School, explained that judicial concern to curb widespread tort liability has – both consciously and unconsciously – influenced courts to deny recovery for economic loss. Rabin, *supra* note 22, at 1528.

distinguishing the honest from the collusive or fraudulent claim."[112] The line between who recovers and who does not can be drawn by utilizing fundamental tort principles, as in *Kinsman Transit*, which drew such a line in deciding that some claims were recoverable[113] and others were too remote and unforeseeable.[114] As Judge Rubin intoned in his *TESTBANK* dissent: "*Robins* should not be extended beyond its actual holding and should not be applied in cases like this, for the result is a denial of recompense to innocent persons who have suffered a real injury as a result of someone else's fault."[115]

2. The *Robins*-expansionists in theory bar all causes of action for economic damages, but in practice they make illogical exceptions for fishermen and seamen. This inherent contradiction moved Judge Wisdom to score the majority's "failure to have a conceptually tenable stopping point for the imposition of liability and the denial of recovery."[116] In *Barber* the First Circuit found that the plaintiff had given no convincing reasons for the "creation of any new exception or class."[117] What could possibly justify recovery for some and not for all who can show that the breach of a duty of care proximately caused foreseeable economic loss?

3. *Robins* characterized the charterer's loss as arising solely from its contract with the shipowner.[118] In the *Robins* scheme of things, it is the contract and not the tort which causes the loss. Under this thinking, the proximate cause of petitioner's losses were: (a) the sales contract between Barkley and National Seed and (b) the requirements of National Seed's import license from the Kingdom of Saudi Arabia. Yet

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[112] 388 F.2d at 823.

[113] 338 F.2d at 725-27.

[114] 388 F.2d at 825.

[115] 752 F.2d at 1053 (Rubin, J., dissenting).

[116] *Id.* at 1044 n.23 (Wisdom, J., dissenting).

[117] Barber Lines A/S v. M/V DONAU MARU, 764 F.2d at 57.

[118] 275 U.S. at 308.

these were in place before respondents obligated themselves to provide a ship, and before they chose to provide the negligently maintained SINGAPORE VICTORY. A more realistic and rational view is that the proximate cause of the loss was respondents' negligence, not petitioner's preexisting contracts. The *Robins*-expansionists have put the burden of negligence in the wrong place. Rather than impose on respondents a duty of care, to encourage them to refrain from negligent conduct, the Ninth Circuit shifted the risk of negligence from the tortfeasors to their victims. Petitioner was dealt the risk of respondents' negligence merely because it did business in the customary manner of merchants since at least the Middle Ages, by contracting for the purchase and sale of goods.[119] The *Robins*-expansionists have not explained why the risk of negligence by a third party should fall on the innocent parties to a commercial contract.

4. As a remedy, all damages are "economic." They compensate for a loss of money, whether from physical injury or absent physical injury, and the *Robins*-expansionists have advanced no conceptual basis for distinguishing between the two. "The physical harm requirement capriciously showers compensation along the path of physical destruction, regardless of the status or circumstances of individual claimants."[120]

Even as the Ninth Circuit joins the *Robins*-expansionist majority, there is a definite trend away from this wooden principle both abroad and in this country. Courts in other common-law nations have abandoned the notion that purely economic loss is unrecoverable.[121] The British House of

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[119] The court focused on petitioner's contract rather than on respondents' tort. *Barkley Seed*, App. at 3, 35.

[120] People Express Airlines, Inc. v. Consolidated Rail Corp., 495 A.2d 107, 111 (N.J. 1985).

[121] *See, e.g.*, Rivtow Marine Ltd. v. Washington Iron Works, 40 D.L.R.3d 530 (Can. 1973); Interocean Shipping Co. v. M/S ATLANTIC SPLENDOUR, [1984] 1 F.C. 931; Caltex Oil (Aust.) Pty. v. Dredge WILLEMSTAD, 136 C.L.R. 529 (Austl. 1976); Port v. New Zealand Dairy Bd., [1982] 2 N.Z.L.R. 282 (H.C. Hamilton); Junior Books Ltd. v. Veitchi

Lords, for example, "rejected the 'floodgates' argument against recovery, finding that defendant's 'knowledge,' the 'proximity between the parties,' and the fact that the loss was the 'direct and foreseeable result' of defendant's negligence were all sufficient 'safeguards against opening the floodgates.' "[122] Many civil-law jurisdictions – notably France and Germany – permit the recovery of purely economic loss under the delictual liability provisions of their civil codes.[123]

A number of U.S. jurisdictions has moved away from a contractual focus of the *Robins* type and toward the application of fundamental tort principles of duty, foreseeability and proximate cause. The Supreme Court of California has held that "[r]ecovery for injury to one's economic interests, where it is the foreseeable result of another's want of ordinary care, should not be foreclosed simply because it is the only injury that occurs."[124] The Supreme Court of New Jersey has laid down the same rule.[125] Adopting New Jersey's reasoning, the Supreme Court of Alaska has held that "a defendant owes a duty of care to take reasonable measures to avoid the risk of causing economic damages, aside from physical injury, to particular plaintiffs" or plaintiffs in an identifiable class whose loss is foreseeable.[126] Tort victims fortunate enough to have their claims decided under state law in California, New Jersey or Alaska can state a cause of action for purely economic losses. If their claims are subject to federal maritime law, however, the state and federal courts in those states must

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Ltd., 1983 A.C. 520 (H.L.) (Scot.) (a nonadmiralty case). These cases are discussed in Shephard, *supra* note 21, at 1005-09 as indicative of the return to tort analysis in Britain and the Commonwealth.

[122] *Id.* at 1009 (quoting *Junior Books*, 1983 A.C. at 532-33).

[123] Shephard, *supra* note 21, at 1020-24.

[124] J'Aire Corp. v. Gregory, 24 Cal. 3d 799, 806, 598 P.2d 60 (Cal. 1979).

[125] People Express v. Consolidated, 445 A.2d 107, 111.

[126] Mattingly v. Sheldon Jackson College, 743 P.2d 356, 360 (Alaska 1987) (quoting *People Express*, 495 A.2d at 116).

presently apply the Third or Ninth Circuits' absolute bar to recovery.[127]

The *Robins* doctrine is a defective theory. It depends upon an arbitrary distinction between physical and economic damages and results in no duty of care to avoid economic harm, except to seamen and fishermen. From *Robins*' simple determination in 1927 that a tortfeasor was not liable in negligence to a charterer he did not know about, the First, Third, Fifth, Ninth and Eleventh Circuits, since 1982, have created an absolute bar to economic damages which applies alike to mass toxic torts like the *TESTBANK* pollution and to individual cases of economic harm such as this one.[128] Three federal circuits – the Second, Fourth and Sixth – have not followed the *Robins* party line, but have stuck to the principles of tort law and permitted claimants to try to prove that their economic losses were foreseeable and proximately caused. State supreme courts in California, New Jersey and Alaska have put the case for basic tort law far more convincingly than the *Robins*-expansionists have justified their bright-line rule. Twenty-one of the 44 federal appellate judges who have grappled with this issue have rejected the bright-line rule and voted to follow the fundamental tort principles

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[127] This Court has long distinguished between the common-law remedies preserved by the "saving to suitors" clause (1 Stat. 76-77 (1789), codified at 28 U.S.C. § 1333(1)) and the substantive law that governs the rights asserted in a "saving clause" case. Chelentis v. Luckenbach S.S. Co., 247 U.S. 372 (1918) held that although rights sanctioned by the federal maritime law may be enforced through any appropriate common-law remedy, the maritime law still must be the measure of the defendant's liability. *Id.* at 384.

[128] As Judge Wisdom observed in his *TESTBANK* dissent: "*Robins* is the Tar Baby of tort law in this circuit. And the brier patch is far away. This Court's application of *Robins* is out of step with contemporary tort doctrine, works substantial injustice on innocent victims, and is unsupported by the considerations that justified the Supreme Court's 1927 decision." Louisiana *ex rel.* Guste v. M/V TESTBANK, 752 F.2d at 1035 (Wisdom, J., dissenting).

of duty, foreseeability and proximate cause.[129] The circuits are sharply in conflict, and the admiralty law in five circuits is out of step with tort law in America, the Commonwealth countries and much of Western Europe.

The Ninth Circuit and those with whom it joined in *Channel Star* have forgotten the ontological source and forsaken the ethological purpose of tort law:

> The tort process, like the law itself, is a human institution designed to accomplish certain social objectives. One objective is to ensure that innocent victims have avenues of legal redress, absent a contrary, overriding public policy. . . . This reflects the overarching purpose of tort law: that wronged persons should be compensated for their injuries and that those responsible for the wrong should bear the cost of the tortious conduct. . . .[130]

The *Robins* doctrine contradicts this purpose, and is due to be overruled. On the authority of basic tort law, three circuit courts of appeals, the dissents in *TESTBANK* and *Getty*, and the rejection of an absolute bar to economic damages by 21 federal appellate judges sitting in six different circuits, petitioner respectfully asks this Court to grant this petition and turn its attention to this serious cleft in the federal maritime law.

DATED: March 4, 1997

Respectfully submitted,

MICHAEL W. LODWICK
of FISHER & PORTER
Counsel of Record for Petitioner

DAVID L. KURTZ
of O'CONNOR, CAVANAGH, ANDERSON, WESTOVER, KILLINGSWORTH & BESHEARS
Of Counsel

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[129] *See* App. 41-43.

[130] People Express v. Consolidated, 495 A.2d at 111.

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BARKLEY SEED, INC. d/b/a PACIFIC SOUTHWEST SEED & GRAIN, INC., a corporation, Plaintiff-Appellant, v. CORMORANT BULK CARRIERS, a corporation; THE VESSEL "SINGAPORE VICTORY," its engines, tackle, apparel, furniture and appurtenances, Defendants, and BOTELHO SHIPPING CORP., a corporation; ASEAN CHARTERING CO., LTD., a corporation; FAIRMONT SHIPPING (H.K.) LTD., a corporation; and SINGCO MARITIME S.A., a corporation, Defendants-Appellees.	No. 95-55476 D.C. Nos. 89-6322-JGD 91-2583-JGD MEMORANDUM* (Filed Oct. 24, 1996)

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Appeal from the United States District Court
for the Central District of California
John G. Davies, District Judge, Presiding

Argued and Submitted August 8, 1996
Pasadena, California

Before: FLETCHER, TASHIMA, Circuit Judges, and RESTANI,** United States Court of International Trade Judge

Plaintiff-appellant Barkley Seed, Inc. ("Barkley") appeals the district court's judgment in favor of Asean Chartering Co., Ltd. ("Asean") and others, in which Barkley sought recovery of damages caused by Asean's untimely ship transport of wheat seed.

We have jurisdiction pursuant to 28 U.S.C. § 1291 and we affirm the dismissal of the action.

FACTUAL AND PROCEDURAL BACKGROUND

Appellee and defendant Cormorant Bulk Carriers ("Cormorant") are common carriers of goods between various ports. In September 1988, Asean chartered the M/V Singapore Victory ("Victory") to Cormorant to carry Barkley's cargo of wheat seed from Los Angeles, California to Damman [*sic*], Saudi Arabia. Bills of lading indicating that the cargo was on board the vessel were issued on September 25 and 30, 1988. The cargo, however, was not loaded onto the vessel until October 20, 1988. Upon receipt of these allegedly misdated bills of lading, Barkley tendered them and received payment on the letters of

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** Honorable Jane A. Restani, Judge, United States Court of International Trade, sitting by designation.

credit. Barkley asserted that it sustained damages because Victory failed to arrive in Los Angeles at the agreed upon time to load Barkley's time sensitive cargo. Moreover, once the cargo was finally loaded, Victory failed to carry the cargo to its destination in Damman [*sic*], Saudi Arabia within the time contemplated or within a reasonable time. According to Barkley, the cargo reached its destination on December 7, 1988, while the agreed delivery date was November 20, 1988.

Barkley alleged that this late delivery caused it damages. The damages were those suffered by Barkley's customer in Saudi Arabia, National Seed & Agricultural Service Company ("National Seed"), which had to receive the cargo in a timely manner so that it could perform on contracts with Saudi farmers. Because of the delay and the relatively short Saudi growing season, National Seed covered by buying substitute wheat on the spot market, thus avoiding contractual disputes with its customers. Barkley claimed that National Seed sustained damages as a result of the cover and storage of the wheat seed aboard Victory when the ship finally arrived in Saudi Arabia. Barkley entered into an agreement with National Seed whereby National Seed accepted partial payment for its damages in exchange for National Seed's assignment of its rights to sue on the remainder of its damages to Barkley.

On October 30, 1989, Barkley filed suit against Cormorant and Asean invoking the district court's jurisdiction over matters of admiralty and maritime law. Barkley's five-count complaint asserted claims of damage to cargo, unseaworthiness, negligence, breach of contract,

and unreasonable deviation. Default judgment was granted against Cormorant. Cormorant did not appeal.

On May 13, 1991, Barkley filed a complaint against Botelho Shipping Corp. and Fairmont Shipping (H.K.) Ltd. who were responsible for Victory's maintenance and operation. Barkley's complaint contained four causes of action: (1) breach of carrier's duty to provide a seaworthy vessel; (2) fraud in the inducement of Barkley to commit to ship on Victory; (3) misrepresentation of Victory's condition and capabilities; and (4) wanton and wilful misconduct in the nature of fraud and misrepresentation justifying exemplary damages.[1]

The bench trial was bifurcated into liability and damages phases. When Barkley rested its liability case on February 16, 1995, appellees made an oral motion for summary adjudication based on a deferred pretrial motion. Ruling from the bench, the district court dismissed Barkley's complaint. The district court made findings of fact and conclusions of law, entered judgment and taxed costs. A timely notice of appeal was filed on March 28, 1995.

DISCUSSION

The district court held that Barkley could not recover the economic damages forseeably and proximately caused by appellees' negligence because the Ninth Circuit applies the *Robins Dry Dock* doctrine and refuses to recognize economic loss arising from a contract with a

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[1] The fraud claims are not a subject of appeal.

third party absent physical damage resulting from the claimed negligence.

In *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927), the Supreme Court held that a ship repairer whose negligence damaged a ship's propeller and delayed her voyage was not liable for the charterer's loss of revenues from the lost voyage, because the repairer owed a duty of care only to the owner of the ship, not to the charterer. *Id.* at 309. Justice Holmes wrote:

> as a general rule, at least, a tort to the person or property of one man does not make the tortfeasor liable to another merely because the injured person was under a contract with that other, unknown to the doer of the wrong. The law does not spread its protection so far.

Id. (citation omitted). Following *Robins*, courts adopted a bright line rule that, absent physical damage or injury, there is no recovery for loss of financial benefits of a contract or of prospective trade because of negligent interference with a contractual relationship. *See, e.g., Barber Lines A/S v. M/V Donau Maru*, 764 F.2d 50, 51 (1st Cir. 1985); *Getty Ref. & Mktg. Co. v. MT FADI B*, 766 F.2d 829, 833 (3d Cir. 1985); *Louisiana v. M/V Testbank*, 752 F.2d 1019, 1032 (5th Cir. 1985) (*en banc*), *cert. denied*, 477 U.S. 903 (1986); *Kingston Shipping Co., Inc. v. Roberts*, 667 F.2d 34, 35 (11th Cir.), *cert. denied*, 458 U.S. 1108 (1982); and *Federal Commerce & Navigation Co., Ltd. v. M/V Marathonian*, 528 F.2d 907, 908 (2d Cir. 1975); *but see Petition of Kinsman Transit Co.*, 388 F.2d 821, 824-25 (2d Cir. 1968).

In *Channel Star Excursions, Inc. v. South* [*sic*] *Pacific Transp. Co.*, 77 F.3d 1135, 1138 (9th Cir. 1996) (no recovery for loss of business by cruise line for negligent failure to

open bridge), the Ninth Circuit recognized the *Robins* rule as controlling while acknowledging limited exceptions, *see Carbone v. Ursich*, 209 F.2d 178 (9th Cir. 1953) (recovery for negligent fouling of fishermen's nets full of fish); *Union Oil Co. v. Oppen*, 501 F.2d 558 (9th Cir. 1974) (recovery for damage caused by oil spills to fish and marine ecosystem), but declined to extend these exceptions beyond damages to commercial fishermen or the maritime ecosystem. Barkley's claims do not come close to fitting within these exceptions. Accordingly, based on *Channel Star*, we affirm the court's dismissal of Barkley's claims except its claim for breach of warranty of seaworthiness, which we address separately.

The district court held that Barkley failed to sustain its burden of proving that Victory was unseaworthy. Barkley asserts that this finding was clearly erroneous in view of the testimony of two expert witnesses regarding the vessel's delay and deficient condition.

"Seaworthiness is a relative term depending for its application upon the type of vessel and the character of the voyage. The general rule is that the ship must be staunch and strong and well equipped for the intended voyage." *Newfoundland Export & Shipping Co., Ltd. v. United British S.S. Co., Ltd.*, 69 F.2d 300, 304 (5th Cir.), *cert. denied*, 292 U.S. 651 (1934). According to Barkley, expert witness testimony demonstrates that Victory underwent numerous repairs to its engines only six months prior to the loading of Barkley's cargo, that the vessel's cranes were in disrepair and nonfunctional, and that the conditions of the engines prevented reasonable sailing speed, and that it was, according to one expert, unreliable.

The district judge found that: (1) loading the wheat seed was expected to take five days, but because of mechanical problems with the ship's cargo gear, it lasted six days, (2) the letters of credit contemplated a 35-40 day voyage from Los Angles [*sic*], California to Damman [*sic*], Saudi Arabia, but Victory took 47 days; (3) the chartering agreement provided that vessel would make 13 knots "without guarantee"; the vessel was making in excess of 13 knots before delivery to Cormorant, but the vessel averaged 11 knots from Los Angeles to Damman [*sic*]; (4) the cargo, although late under contract terms, was delivered in time for the Saudi planting season.[2] Based on these findings, the district court concluded that the ship was fit for its intended purposes and not unseaworthy. We review such factual matters for clear error. As the district court did not clearly err in its overall finding of seaworthiness, we affirm. Accordingly, we need not and do not reach the issue of whether privity of contract is required to sustain a claim of breach of warranty of seaworthiness.

The district court's dismissal of Barkley's complaint is AFFIRMED.

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[2] By itself, failure to meet contract delivery dates is not a basis for recovery against non-contracting parties, such as appellees.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BARKLEY SEED, INC. d/b/a PACIFIC SOUTHWEST SEED & GRAIN, INC., a corporation Plaintiff-Appellant, v. CORMORANT BULK CARRIERS, a corporation; THE VESSEL "SINGAPORE VICTORY," its engines, tackle, apparel, furniture and appurtenances, Defendants, and BOTELHO SHIPPING CORP., a corporation; ASEAN CHARTERING CO., LTD., a corporation; FAIRMONT SHIPPING (H.K.) LTD., a corporation; and SINGCO MARITIME S.A., a corporation, Defendants-Appellees.	No. 95-55476 D.C Nos. 89-6322-JGD 91-2583-JGD ORDER (Filed Dec. 6, 1996)

Before: FLETCHER, TASHIMA, Circuit Judges, and RESTANI,*

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Fletcher and Tashima have voted to reject the suggestion for rehearing en banc and Judge Restani so recommends.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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* Honorable Jane A. Restani, Judge, United States Court of International Trade, sitting by designation.

APPENDIX C

BARKLEY SEED, INC. D/B/A PACIFIC SOUTHWEST SEED & GRAIN, INC., *Plaintiff*

v.

CORMORANT BULK CARRIERS; THE VESSEL *SINGAPORE VICTORY*, ITS ENGINES, *ETC.* AND ASEAN CHARTERING CO., LTD., *Defendants*

[AND RELATED ACTION]

United States District Court, Central District of California; September 25, 1991
In Admiralty, Nos. 89 6322 JGD and 91 2583 JGD

BILLS OF LADING – 145. Receipt of Quantity and Description Stated – 1931. Faults of Shipper – INDEMNITY AND CONTRIBUTION – 16. Liability of Other Persons and Vessels.

COGSA sec. 3(5), requiring shipper to indemnify carrier for "inaccuracies in marks, number, quantity and weight", does not apply to the date of the B/L or the location of the cargo. *Held*: Court will dismiss carrier's counterclaim based on shipper's alleged participation in scheme to predate B/L to indicate that cargo was on board vessel some three weeks before it was actually loaded.

BILLS OF LADING – 145. Receipt of Quantity and Description Stated – FRAUD – Failure to Prove Reliance.

Ocean carrier's RICO counterclaim against shipper, based on wire fraud, will be dismissed for failure to establish that carrier relied on B/L which falsely stated that the goods were on board the carrying vessel.

Gerald M. Fisher and Michael W. Lodwick (Fisher & Porter) *for Plaintiff*
William H. Collier, Jr. and William F. Daly, Jr. (Keesal, Young & Logan, P.C.) *for Defendants*

JOHN G. DAVIES, D.J.:

Defendants Asean Chartering Co., Ltd. ("Asean") and Cormorant Bulk Carriers ("Cormorant") are common carriers of goods between various ports. On or about September 2, 1988, Asean chartered the M/V *Singapore Victory* to Cormorant in order to carry plaintiff's cargo of wheat seed from Los Angeles to Dammam, Saudi Arabia.

Bills of lading indicating that the cargo was on board the vessel were issued on or about September 25 and 30, 1988. However, the cargo was not loaded onto the vessel until October 20, 1988. Upon receipt of these allegedly misdated bills of lading the plaintiff tendered them and received payment on the letters of credit.

Plaintiff alleges that it sustained damages because the *Singapore Victory* failed to arrive in Los Angeles at the agreed upon time to load plaintiff's time-sensitive cargo. Moreover, once the cargo was finally loaded, the *Singapore Victory* failed to carry the cargo to its destination in Dammam, Saudi Arabia within the time contemplated or within a reasonable time. According to plaintiff, the cargo reached its destination on December 7, 1988, which, as plaintiff alleges, was after the agreed delivery date of November 20, 1988.

Plaintiff alleges that this late delivery caused it damages. Plaintiff's alleged damages are those suffered by plaintiff's customer in Saudi Arabia, National Seed &

Agricultural Service Company ("National Seed") which had to receive the cargo in a timely manner so that it could perform on "hundreds" of contracts with Saudi farmers. Because of the delay and the relatively short Saudi growing season, National Seed had to cover by buying substitute wheat on the spot market in order to avoid breaching its contracts with its customers. Plaintiff claims that National Seed sustained damages as a result of having to cover and having to store the wheat seed aboard the *Singapore Victory* when the ship finally arrived in Saudi Arabia. Plaintiff made an agreement with National Seed whereby National Seed accepted partial payment for its damages in exchange for National Seed's assigning its rights to sue on the remainder of its damages.

On October 30, 1989, the plaintiff filed its Complaint against Cormorant and Asean invoking the Court's jurisdiction over matters of admiralty and maritime law. Plaintiff's five count Complaint asserts claims of damage to cargo, unseaworthiness, negligence, breach of contract, and unreasonable deviation. Plaintiff seeks to recover damages in the amount of $3,379,277.50. On January 22, 1990, defendant Asean filed its Answer to plaintiff's Complaint. On June 6, 1990, the clerk entered a final default judgment against defendant Cormorant. On August 23, 1990, the Court denied defendant Cormorant's Motion to Set Aside Default and Quash Service of Process. Subsequently, Cormorant filed a Motion of Reconsideration which this Court denied on September 17, 1990.

On February 1, 1991, the Court denied defendant Asean's Motion for Summary Judgment, but granted Asean's Motion for Leave to File a Counterclaim. On

February 12, 1991, defendant Asean filed its Counterclaim alleging the following causes of action: (1) total equitable indemnification pursuant 46 U.S.C. § 1303(5); (2) comparative partial indemnification pursuant to 46 U.S.C. § 1303(5); (3) contribution pursuant to 46 U.S.C. § 1303(5); and (4) three times the amount of contribution or indemnification, attorneys' fees and expenses pursuant to 18 U.S.C. § 1961 *et seq.* (a RICO counterclaim).

During the course of discovery in this action, plaintiff deposed Fairmont Shipping (H.K.) Ltd. ("Fairmont"), who plaintiff alleges was in charge of the maintenance and operation of the *Singapore Victory*. According to plaintiff, the deposition revealed that Fairmont and the party for whom it was working, Botelho Shipping Corp. ("Botelho"), neglected the vessel's maintenance and repair needs.

On May 13, 1991, plaintiff filed a Complaint against Botelho Shipping Corp. ("Botelho") and Fairmont Shipping (H.K.) Ltd. ("Fairmont"). Plaintiff's Complaint contained four causes of action: (1) breach of carrier's duty to provide a seaworthy vessel; (2) fraud in the inducement of plaintiff to commit to ship on the *Singapore Victory*; (3) misrepresentation of the condition and capabilities of the vessel; and (4) wanton and wilful misconduct in the nature of fraud and misrepresentation justifying exemplary damages.

On June 24, 1991, defendant Botelho filed its Answer and Counterclaim against plaintiff. Botelho counterclaimed for the following causes of action: (1) total equitable indemnity pursuant to 46 U.S.C. § 1303(5); (2) comparative partial indemnity pursuant to 46 U.S.C.

§ 1303(5); (3) contribution pursuant to 46 U.S.C. § 1303(5); and (4) three times the amount of contribution or indemnification, attorneys' fees and expenses pursuant to 18 U.S.C. § 1961 *et seq.* (a RICO counterclaim). Thus, Botelho asserts the identical counterclaims as Asean in its action with plaintiff Barkley Seed.[1]

On July 8, 1991, defendant Botelho petitioned this Court for an order dismissing plaintiff's case as filed outside the statute of limitations. On July 29, 1991, this Court denied Botelho's Motion for Dismissal on the grounds that the Carriage of Goods by Sea Act ("COGSA") did not apply to bar the plaintiff's cognizable claims.

On August 26, 1991, plaintiff filed a Motion for Summary Judgment on defendant Asean's first three causes of action in its counterclaim, and a Motion for Summary Judgment, or in the alternative, a Judgment on the Pleadings as to defendant Asean's fourth counterclaim. On that same date, plaintiff filed a Motion for Summary Judgment on defendant Botelho's first three causes of action

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[1] Defendant Fairmont filed its Answer and Counterclaim on September 5, 1991. Fairmont asserts the following counterclaims against plaintiff: (1) total equitable indemnity pursuant to 46 U.S.C. § 1303(5); (2) comparative partial indemnity pursuant to 46 U.S.C. § 1303(5); (3) contribution pursuant to 46 U.S.C. § 1303(5); (4) equitable indemnity and/or contribution; and (5) three times the amount of contribution or indemnification, attorneys' fees and expenses pursuant to 18 U.S.C. § 1961 *et seq.* Fairmont's causes of action are not the subject of this Order. Plaintiff sought and this Court grants summary judgment only as to the counterclaims of defendants Asean and Botelho.

in its counterclaim, and a Motion for Summary Judgment, or in the alternative, a Judgment on the Pleadings as to defendant Botelho's fourth counterclaim. The parties stipulated to consolidate the above related actions on September 4, 1991.

Plaintiff's motions for summary judgment on defendants Asean's and Botelho's respective counterclaims are the subject of this Order.

Discussion

Rule 56(c) of the Federal Rules of Civil Procedure provides that a court shall grant a motion for summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. Rule 56(c). Whether a fact is material is determined by looking to the substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Facts are deemed "material" if a dispute over them "might affect the outcome of the suit under the governing law. . . . " Id.

The moving party has the burden of demonstrating the absence of a genuine issue of fact for trial. Id. at 256. Rule 56(e) provides that "[w]hen a motion for summary judgment is made and supported as provided for in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse

party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party." Fed. R. Civ. P. Rule 56(e).

As the Supreme Court explained in *Matsushita Electrical Industry Co. v. Zenith Radio Corp.*, 477 U.S. 574, 586-87 (1986):

> "When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.' "

Having set forth the applicable standard for summary judgment, the Court now turns to a consideration of whether summary judgment is proper on defendants' counterclaims.

1. *The Counterclaims Based on 46 U.S.C. § 1303(5)*

Defendants Asean and Botelho have each asserted three counterclaims for equitable indemnity, partial indemnity and contribution pursuant to 46 U.S.C. § 1303(5). Defendants' theory for the counterclaims is that plaintiff agreed with Cormorant and others to predate the bills of lading in order to obtain lines of credit. This predating of the bills of the lading, defendants contend, entitles them to indemnification and/or contribution under 46 U.S.C. § 1303(5) which provides:

> "[t]he shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity, and

> weight, as furnished by him; and the shipper shall indemnify the carrier against all loss, damages, and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper."

In their papers, defendants assert plaintiff misdated the bills of lading, thereby misstating the location of the goods on the date the bills of lading were issued.[2] However, the statutory language makes clear that indemnity by the shipper is limited to loss, damages and expenses arising only from inaccuracies in the "marks, number, quantity, and weight, as furnished by him." The statute does not extend to provide indemnity in the event of inaccuracy as to the "date" or "location" of the cargo in question. Although "marks" are not explicitly defined in the statute, they appear to be identifying marks stamped or otherwise shown on the goods, and have no connection whatsoever with the date of the bill of lading or the location of the shipment.

Therefore, defendants have failed to establish a genuine issue as to the accuracy of the marks, number, quantity and weight. Thus, summary judgment in favor of plaintiff is hereby granted on defendants Asean's and

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[2] Defendants assert that they "would show there is an inaccuracy in the marks and other descriptions of the cargo contained in both bills of lading *inasmuch as both bills of lading misstate the location of the cargo on the date in question.*" (emphasis added).

Botelho's first three counterclaims for indemnification and/or contribution pursuant to 46 U.S.C. § 1303(5).

2. *The RICO Counterclaim*

Pursuant to the federal statute governing Racketeering Influenced Corrupt Organizations ("RICO"), 18 U.S.C. §§ 1961-1968, defendants assert a cause of action to treble the amount of indemnification and/or contribution that they are entitled under 46 U.S.C. § 1303(5). However, as discussed in the preceding section, defendants are entitled to no indemnification or contribution under 46 U.S.C. § 1303(5). Since defendants' counterclaims for indemnification and contribution fail, any RICO claim to treble such amount must likewise fail.

Moreover, even assuming that defendants were entitled to indemnification or contribution, the RICO counterclaim would fail for independent reasons. Defendants' fourth counterclaim alleges that plaintiff fraudulently misdated the bills of lading giving rise to liability under RICO. 18 U.S.C. § 1962. Defendants' RICO counterclaim theory is essentially that plaintiff along with Cormorant and others formed an enterprise that conducted its affairs through a pattern of racketeering activity by falsifying bills of lading.

As explained above, summary judgment is appropriate where there is no genuine issue of material fact and the case can be decided as a matter of law. Whether a fact is "material" is determined by examining the substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Thus, in evaluating summary judgment on the

RICO counterclaim, it is necessary to consider the substantive law of RICO.

The operative section of RICO provides:

> "[i]t shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." 18 U.S.C. § 1962(c).

In their respective counterclaims, defendants allege that plaintiff's "racketeering activity" was obtaining money by false pretenses in violation of 18 U.S.C. § 1342. 18 U.S.C. § 1342 is, ironically, not one of the enumerated sections that will give rise to RICO liability. See 18 U.S.C. 1961. Thus, in their opposition papers to plaintiff's Motion for Summary Judgment, defendants abandon that argument and appear to settle upon a theory of wire fraud pursuant to 18 U.S.C. § 1343.[3]

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[3] Defendants' change in argument may also be due to the position taken by plaintiff in its Motion for Summary Judgment. Plaintiff begins with the premise that it is necessary for the party asserting the RICO claim to show that he was injured by a violation of § 1962. *Moss v. Morgan Stanley, Inc.*, 719 F.2d 5, 17 (2d Cir. 1983). Plaintiff characterizes defendants' allegations of injury as stemming from the fraudulent misrepresentations in the bills of lading as to the date of such bills. Plaintiff then argues that a claim based on fraudulent misrepresentation requires a showing of detrimental reliance. *Rozay's Transfer v. Local Freight Drivers, Local 208, Int'l Brotherhood of Teamsters, Chauffeurs, Warehousemen, & Helpers of America*, 850 F.2d 1321, 1326 (9th Cir. 1988), cert. denied, 490 U.S. 1030. As plaintiff

18 U.S.C. § 1343 provides:

> "[w]hoever, having devised or intending to devise any scheme or artifice to defraud or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined. . . . "

Even permitting defendants to change their allegations would not prevent granting summary judgment. Defendants admit that their counterclaims, do not "specifically

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persuasively notes, defendants should not be heard to say that they detrimentally relied on the misdescription in the dates of the bills of lading for two reasons. First, the chief officer of the *Singapore Victory* signed a mate's receipt on October 20, 1988 which stated that the cargo had been loaded aboard as of that date. Second, the master of the *Singapore Victory* signed a master's receipt on October 20, 1988 which stated that the vessel berthed and commenced loading of cargo in Los Angeles on October 14, 1988 and completed loading cargo on October 20, 1988. Thus, defendants knew that the cargo was not loaded in September as the bills of lading indicated. Rather, they knew the actual date of loading. Thus, they did not rely on the misdescription in the bills of lading and accordingly could have suffered no injury as required under RICO.

In response to this argument, defendants do not refute any of the evidence but instead attempt to argue that the theory of the allegations is a criminal violation pursuant to 18 U.S.C. § 1343. However, as plaintiff's reply papers ably demonstrate, defendants refer to a fraud on numerous occasions within both their Counterclaim and Opposition to the Motion for Summary Judgment.

reference" 18 U.S.C. § 1343, but argue that Barkley Seed's "communications" clearly establish the basis for liability under 18 U.S.C. § 1343. However, defendants nowhere allege that "means of wire, radio or television communication" were used to perpetrate plaintiff's alleged fraud.[4] Therefore, summary judgment in favor of plaintiff is appropriate on the respective RICO counterclaims of defendants Asean and Botelho.

Conclusion

There is no genuine issue as to a material fact on any of the defendants' counterclaims. This is precisely the type of situation where summary judgment is appropriate. Accordingly, the Court hereby grants plaintiff's motion for summary judgment on the respective counterclaims of defendants Asean and Botelho.

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[4] Moreover, any cause of action based on the mail fraud statute, 18 U.S.C. § 1341 is likewise appropriate for summary judgment. The mail fraud statute provides in pertinent part:

> "[w]hoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . for the purpose of executing such scheme or artifice or attempting to do so, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, . . . shall be fined. . . . " 18 U.S.C. § 1341.

Again, defendants nowhere allege that the Postal Service was used to perpetrate the fraud.

APPENDIX D

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

BARKLEY SEED, INC. d/b/a PACIFIC SOUTHWEST SEED & GRAIN, INC., a corporation, Plaintiff, v. CORMORANT BULK CARRIERS, a corporation; The Vessel "SINGAPORE VICTORY," its engines, tackle, apparel, furniture and appurtenances; ASEAN SHIPPING, a corporation, Defendants. AND ALL RELATED ACTIONS AND CROSS ACTIONS.	IN ADMIRALTY NO. CV-89-6322 JGD (JRx) CONSOLIDATED WITH NO. CV-91 2583 JGD (JRx) FINDINGS OF FACT AND CONCLUSIONS OF LAW (Filed Mar. 8, 1995)

PROPOSED FINDINGS OF FACT

1. Plaintiff BARKLEY SEED, INC. d/b/a PACIFIC SOUTHWEST SEED & GRAIN, INC. ("Barkley Seed") is a corporation duly organized and existing by virtue of law with its principal place of business in the city of Yuma, Arizona.

2. Defendant SINGCO MARITIME S.A. ("Singco") was at all material times a corporation organized and existing by virtue of the laws of some foreign country with its principal place of business in Panama, Republic of Panama. Singco was the owner of the *M/V SINGAPORE VICTORY.*

3. Defendant BOTELHO SHIPPING CORP. ("Botelho") was at all material times a corporation organized and existing by virtue of the laws of some foreign country and has its principal place of business in Manila, the Philippines. Botelho was the bareboat charterer of the *M/V SINGAPORE VICTORY.*

4. Defendant ASEAN CHARTERING CO., LTD. ("Asean") was at all material times a corporation organized and existing pursuant to the laws of Liberia with its principal place of business in Monrovia, Liberia. Asean was the time-charterer of the *M/V SINGAPORE VICTORY.*

5. Defendant FAIRMONT SHIPPING (H.K.) LTD. ("Fairmont") was at all material times a corporation organized and existing by virtue of the laws of some foreign country and has its principal place of business in Hong Kong. Fairmont was at all material times the operator and managing agent of the *M/V SINGAPORE VICTORY.*

6. Defendant CORMORANT BULK CARRIERS ("Cormorant") was at all material times a corporation organized and existing pursuant to the laws of some foreign country. Cormorant was a sub-time charterer of the *M/V SINGAPORE VICTORY*.

7. Plaintiff is in the business of selling seed for agricultural production, some of which is sold to buyers in Saudi Arabia. During 1988, plaintiff agreed to sell two shipments, totaling approximately 25,000 metric tons of wheat seed to NATIONAL SEED & AGRICULTURE SERVICE CO. ("National Seed") of Saudi Arabia. It was the second shipment, consisting of approximately 15,000 metric tons of seed, which is the subject of this case.

8. Under the terms of the Barkley Seed-National Seed agreement, as embodied in letters of credit arranged by National Seed, Barkley Seed was required to ship 10,000 metric tons of wheat seed under clean "on-board" bills of lading by not later than August 25, 1988, an additional 10,000 metric tons of wheat seed under clean "on-board" bills of lading by not later than September 25, 1988, and an additional 5,000 metric tons of wheat seed under clean "on-board" bills of lading by not later than September 30, 1988. Those dates were specified by the buyer, National Seed, in anticipation of a 35 to 40 day voyage duration from Los Angeles to Saudi Arabia. With the last vessel loaded by September 30, National Seed expected to receive the final shipment by November 10, with a five-day cushion before the government imposed import deadline of November 15.

9. In the summer of 1988, Barkley Seed agreed with Cormorant to ship all of its wheat seed shipments aboard

vessels which Cormorant would furnish. In August 1988, Cormorant furnished a vessel called the *M/V SAMAR VICTORY* to transport plaintiff's first shipment.

10. On September 2, 1988, Cormorant entered into a charter party agreement with defendant Asean for use of the *M/V SINGAPORE VICTORY*. Under the terms of that agreement, Asean was to deliver the *M/V SINGAPORE VICTORY* (which was then in a shipyard undergoing repairs) to Cormorant somewhere between Vancouver, British Columbia and the Columbia River, or to an equidistant point along the United States West Coast, at Cormorant's option. Cormorant was permitted to use the vessel to carry any cargo not expressly excluded in the charter party. Asean was to deliver the vessel sometime between September 25 and October 5, 1988. If not delivered by October 5, Cormorant had the option of cancelling the charter party agreement.

11. On September 12, 1988, Cormorant advised the vessel's manager, Fairmont, via their respective chartering brokers, that the *M/V SINGAPORE VICTORY* was to proceed from the shipyard in Sasebo, Japan to Los Angeles, California to load a cargo of bagged wheat seed for delivery in Dammam, Saudi Arabia. Cormorant did not advise Fairmont of any particular loading deadline or of any import deadline for the cargo in Saudi Arabia.

12. The *M/V SINGAPORE VICTORY* experienced delays in completing shipyard repair work and did not depart Sasebo until September 17, 1988. Once underway, the vessel experienced mechanical difficulties, delaying its progress en route to Los Angeles. Fairmont advised

Cormorant, via their respective brokers, of these delays. Cormorant in turn advised Barkley Seed of the delays.

13. On September 27, Fairmont advised Cormorant that as a result of the *M/V SINGAPORE VICTORY*'s mechanical difficulties, the vessel would not reach the delivery point off the California coast by the October 5 delivery deadline specified in the charter party. Fairmont requested that Cormorant advise whether it wished to cancel the charter party or extend the cancellation date.

14. On October 5, Cormorant advised Fairmont that Cormorant agreed to extend the charter party canceling date from October 5 to October 12. Fairmont confirmed the extension and advised Cormorant that the *M/V SINGAPORE VICTORY* had an estimated time of arrival at the delivery point of October 12, and an estimated time of arrival at Los Angeles of October 14. Barkley Seed did not participate in the decision to extend the cancellation date.

15. Because or [*sic*] the delays to the vessel, Barkley realized that its cargo would not be aboard the carrying vessel by the dates specified in National Seed's letters of credit, (*i.e.* September 25 and September 30). Consequently, Barkley Seed urged Cormorant to release clean "on-board" bills of lading reflecting that the cargo was laden "on board" the vessel as of September 25 and September 30, respectively, notwithstanding the fact that the *M/V SINGAPORE VICTORY* had not yet arrived in Los Angeles to load the cargo. Shortly thereafter, Barkley Seed presented those bills of lading, together with other documentation required by the letters of credit, to the bank for payment. Barkley Seed received full payment

from National Seed under the letters of credit for the subject wheat seed.

16. The *M/V SINGAPORE VICTORY* arrived in Los Angeles on October 14, and began loading plaintiff's cargo. Loading was complete on October 20, and the *M/V SINGAPORE VICTORY* departed Los Angeles on October 22. The vessel stopped in Singapore for approximately 12 hours on November 24 to obtain certification for its cargo gear as required by the Saudi Arabian Port Authority for vessels over 15 years of age. The vessel resumed its voyage to Dammam, arriving December 7, 1988 after a 47 day voyage of nearly 12,000 miles. All of plaintiff's cargo was discharged, undamaged, by December 13, 1988.

17. Barkley Seed never told National Seed (1) that the *M/V SINGAPORE VICTORY* was delayed in departing Sasebo, Japan; (2) that the vessel encountered mechanical difficulties en route to Los Angeles; (3) that the cargo was not loaded aboard the vessel until October 20; (4) that the vessel would not arrive in Dammam by the November 15 import deadline; and (5) that Barkley Seed had negotiated the antedated bills of lading knowing that the cargo was not aboard the *M/V SINGAPORE VICTORY* on the dates reflected on the bills of lading.

18. On October 24, Barkley Seed responded to an October 19 telex from National Seed inquiring as to the status of the second shipment. Although the *M/V SINGAPORE VICTORY* had left Los Angeles just two days before on October 22, with an expected voyage length of 35 to 40 days, Barkley Seed informed National Seed that the *M/V SINGAPORE VICTORY* had an estimated time of arrival at Dammam of November 10.

19. On November 21, National Seed again inquired by telex as to the vessel's estimated time of arrival at Dammam. Barkley Seed responded by telex, advising National Seed that the *M/V SINGAPORE VICTORY* had departed Singapore and would arrive soon in Saudi Arabia. In fact, the *M/V SINGAPORE VICTORY* did not arrive in Singapore until November 24, and in Dammam until December 7. Plaintiff presented no evidence to suggest that defendants, Cormorant or anyone else furnished it with the erroneous information which it provided to National Seed. Barkley Seed never corrected any of the erroneous information it provided to National Seed.

20. Barkley Seed contends that due to the late arrival of the *M/V SINGAPORE VICTORY* in Saudi Arabia, National Seed was forced to purchase 10,000 metric tons of "cover" wheat to meet its contracts with Saudi farmers. National Seed purchased wheat locally from three suppliers: Hadco, Inma and Al-Hanaki. The invoices from Hadco for the "cover" wheat indicate that National Seed agreed to purchase the wheat on November 19, just four days after the November 15 import deadline imposed by the Saudi Arabian Ministry of Agriculture and Water. Since the invoices from Inma and Al-Hanaki are written in Arabic, it is unclear when National Seed contracted to purchase wheat from them, and no evidence was presented on this point.

21. Because National Seed purchased wheat but was obligated to deliver seed to the farmers, National Seed contends it had to clean, treat, bag and deliver the "cover" wheat seed. Plaintiff's expert witness on agronomy issues, Brian Schweitzer, testified that there were only two cleaning machines in all of Saudi Arabia, with a

capacity of just 500 metric tons per day. Accordingly, it would have taken at least 20 days to clean all the wheat purchased by National Seed before it could be treated with an herbicide.

22. No evidence was presented as to (1) when National Seed took delivery of the "cover" wheat; (2) when the wheat was cleaned; (3) when the wheat was treated with fumigant; (4) when the wheat was bagged; or (5) when the wheat was delivered to the farmers. In short, there was no evidence to suggest that the "cover" seed purchased locally by National Seed was available prior to the seed delivered aboard the *M/V SINGAPORE VICTORY*.

23. Plaintiff's agronomist, Mr. Schweitzer, also testified that based upon his work experience in Saudi Arabia in the wheat seed business, seed discharged from a vessel arriving at Dammam could be delivered to farmers within six to eight days.

24. A Saudi Arabian Ministry of Agriculture and Water publication states that the wheat seed planting season in Saudi Arabia extends from "October to mid-January, or up to the beginning of February in the Northern Region," and that planting is intentionally delayed to avoid frost damage. Mr. Schweitzer concurred that the planting season extends until mid-January.

25. National Seed contended that it suffered a variety of economic losses as a result of the *M/V SINGAPORE VICTORY*'s later than expected arrival in Dammam. None of those losses arose out of physical damage to the wheat seed which, as noted, was all delivered to National Seed in undamaged condition at Dammam.

26. Barkley Seed gave $200,000 and 67.5 metric tons of wheat seed to National Seed as consideration for an all-inclusive, irrevocable assignment of National Seed's claims arising out of the 1988 wheat seed shipment aboard the *M/V SINGAPORE VICTORY*. Barkley Seed then brought these consolidated actions against defendants, seeking recovery of National Seed's damages as well as Barkley Seed's own alleged lost profits in 1989.

27. Plaintiff's Second Amended Complaint in the 1991 action alleged five substantive claims: (1) intentional misrepresentation, fraud and deceit; (2) fraud in the inducement; (3) negligent misrepresentation, fraud and deceit; (4) negligence; and (5) unseaworthiness.

28. Plaintiff has not met its burden of proof on the fraud claims. Specifically, plaintiff presented no evidence of *scienter* on the part of defendants. Accordingly, the Court finds for defendants and against plaintiff on plaintiff's fraud claims.

29. The same is true as to plaintiff's negligent misrepresentation claim. Plaintiff presented no evidence to suggest that defendants made any misrepresentations of a material nature. To the contrary, the evidence shows that defendants' statements concerning the status and condition of the vessel were accurate and true when made. For example, the "Analysis of Vessel's Speed" section of plaintiff's expert's survey report dated March 26, 1992 reflects that during the *M/V SINGAPORE VICTORY*'s voyage from Sasebo, Japan to Los Angeles, California, the vessel's speed steadily improved after some engine problems early in the voyage, eventually reaching a daily average speed in excess of 13 knots on the last

three days of the voyage. Thus, plaintiff failed to prove that defendants did not have a reasonable basis to believe that the *M/V SINGAPORE VICTORY* would be capable of making the 13 knot speed warranted "without guarantee" in the Asean-Cormorant charter party. Accordingly, the Court finds for defendants and against plaintiff on plaintiff's negligent misrepresentation claim.

30. Similarly, plaintiff has not sustained its burden of proof on the unseaworthiness claim. The duty to provide a seaworthy vessel is a contractual duty that is implied in every contract to ship goods by sea. To sustain a claim under a contract of carriage, the shipper must establish that the shipowner was a party to the contract between the shipper and the charterer in order to recover against the owner for breach of the duty of seaworthiness.

31. The bills of lading were negotiated prematurely and not in conformance with Clause 8 of the charter party. The receipt of goods was never verified as is the typical practice. The result is to deprive the owner of the vessel if [*sic*] the limiting rights under COGSA, because the owner never became bound by the bill of lading. So long as the owner is not bound by the terms and conditions of the bill of lading, the owner cannot take advantage of any escape clause.

32. Cormorant chartered the *M/V SINGAPORE VICTORY* from Asean to transport plaintiff's (and others') wheat seed and other agricultural products from Los Angeles to Saudi Arabia. Plaintiff's maritime expert, Captain John Alder, testified that loading in Los Angeles could be expected to last five days. Due to mechanical

problems with the ship's cargo gear, loading lasted six days. Plaintiff's president, Stephen Leffler, testified that the letter of credit loading deadlines were set by the Saudis with the expectation that the Los Angeles to Dammam voyage would last 35 to 40 days. The *M/V SINGAPORE VICTORY* took 47 days to sail from Los Angeles to Dammam. The Asean-Cormorant charter party provided that the vessel would make 13 knots "without guarantee," and the vessel was making in excess of 13 knots when it was delivered to Cormorant. The ship averaged approximately 11 knots on the voyage from Los Angeles to Dammam. All of the cargo was delivered undamaged in sufficient time for planting in the 1988-89 planting season.

33. In short, defendants provided a vessel that was reasonably fit for its intended purpose. A vessel which performs a 12,000 mile voyage (which typically lasts 35 to 40 days) in 47 days is not unseaworthy, particularly given the "vagaries of international shipping." *Pioko Fashions, Inc. v. American President Lines, Ltd.*, 1993 AMC 2615, 2618 (W.D. Wa. 1993). Since the cargo arrived in good, undamaged condition, plaintiff failed to sustain its burden of proving that the vessel was unseaworthy. Accordingly, the Court finds for defendants and against plaintiff on plaintiff's unseaworthiness claim.

34. As to plaintiff's negligence claim, the Court finds that plaintiff's and National Seed's own negligence were substantial factors in causing the losses claimed. Plaintiff's negligence stems from its premature negotiation of the misdated bills of lading. While plaintiff takes the position that its conduct was dictated by economic pressures of the moment, that is simply not an excuse.

Plaintiff's more appropriate remedy was to seek an extension of the letter of credit loading date. It was plaintiff's treatment of the bills of lading and drawing on the letters of credit that caused much of the trouble in this case. Plaintiff is thus estopped from recovering.

35. The sum paid in kind and in cash that resulted in the agreement between Barkley Seed and National Seed was an assignment, and that amount, the value of the wheat seed, is not compensable damage.

36. National Seed has suffered no physical damage to any proprietary interest because the wheat arrived in Saudi Arabia in what appears to be undamaged condition and ready for planting.

37. Defendants' duty to the plaintiff arose out of third-party contracts and plaintiff's expectations concerning date of arrival or vessel speed arose from its contract with Cormorant. Absent the application of the terms expressed in the bills of lading, the defendants breached no duty to plaintiff.

38. It would also not be unreasonable to have expected the buyer, National Seed, to exercise due diligence in payment under letters of credit by verifying that the cargo is in fact timely loaded aboard the vessel. Moreover, it appears that National Seed secured extensions of the November 15 import deadline to November 22 and again to December 20, 1988 from the Saudi Arabian Ministry of Agriculture and Water. The vessel arrived in plenty of time to deliver its cargo within the last of these deadlines.

39. Additionally, in purchasing "cover" wheat as early as November 19, National Seed acted precipitously in bringing about the losses allegedly suffered. Purchases of wheat by National Seed apparently continued through December 4, just three days before the *M/V SINGAPORE VICTORY* arrived in Saudi Arabia. That wheat had to be delivered to National Seed, cleaned, treated with herbicide, bagged and delivered to farmers before it could be planted. There was no evidence presented as to the location in which the wheat was stored before it was delivered to National Seed. Since the planting season extends to mid-January and as late as early February in the Northern Region of Saudi Arabia, there was ample time to use the wheat seed delivered aboard the *M/V SINGAPORE VICTORY*.

40. Cormorant is the most culpable defendant in the case. Any breaches of the bills of lading were solely Cormorant's breaches, not defendants'. Moreover, Cormorant's extension of the cancellation date under the Asean-Cormorant charter party was ill conceived and further contributed to the loss. Plaintiff has a default judgment against Cormorant.

41. Therefore, the Court finds for defendants and against plaintiff on plaintiff's negligence claim.

CONCLUSIONS OF LAW

1. In addition to the foregoing, plaintiff's negligence and unseaworthiness claims are legally unsupportable. As to plaintiff's negligence claim, the *Robins Dry Dock* doctrine applies in the Ninth Circuit as applied to these facts. *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S.

303, 48 S. Ct. 134, 72 L.Ed. 290 (1927); *Slaven v. BP America, Inc.*, 786 F. Supp. 853, 860-61 (C.D. Ca. 1992); *In re Exxon Valdez*, 767 F. Supp. 1509, 1511 (D.Al. 1991).

2. Under the *Robins Dry Dock* doctrine there is no recovery for negligent acts of a defendant that result in no damage to property owned by the plaintiff; physical injury is a necessary condition of recovery. *Getty Refining & Marketing Co. v. MT FADI B*, 766 F.2d 829, 833 (3d Cir. 1985).

3. Even when physical injury is present, any recovery is limited to loss which derives directly from physical damage to property. *Nicor Supply Ships Associates v. General Motors*, 876 F.2d 501, 506 (5th Cir. 1989); *Naviera Maersk Espana. S.A. v. Cho-Me Towing, Inc.*, 782 F. Supp. 317, 320-21 (E.D. La. 1992). Economic losses sustained other than from physical damage to a property interest are not recoverable.

4. The *Robins Dry Dock* doctrine also limits claims that arise from the plaintiff's contractual relationship with a third party. *Cargill, Inc. v. Doxford & Sunderland, Ltd.*, 782 F.2d 496 (5th Cir. 1986)[,] *reh'g denied*, 785 F.2d 1296. Accordingly, any claims based upon contractual benefits plaintiff or its assignor, National Seed, might have anticipated are limited by the *Robins Dry Dock* doctrine.

5. The Court finds that since the wheat seed delivered aboard the *M/V SINGAPORE VICTORY* arrived in undamaged condition and was ultimately planted, National Seed suffered no physical damages to any proprietary interest as required by the *Robins Dry Dock* doctrine.

6. In accordance with the *Robins Dry Dock* doctrine, directly applicable to this case, defendants breached no duty to plaintiff. *Cargill, supra,* 782 F.2d 496; *Dick Meyers Towing Service v. United States,* 577 F.2d 1023 (5th Cir. 1978); *American Dredging Co. v. Plaza Petroleum Inc.,* 845 F. Supp. 91 (E.D.N.Y. 1993). Accordingly, the Court finds for defendants and against plaintiff on plaintiff's negligence claim.

7. The Court also finds that the cash and wheat seed plaintiff paid to National Seed as consideration for the assignment of National Seed's claims are not compensable damages.

8. Plaintiff's unseaworthiness claim is also legally deficient due to the lack of privity between plaintiff and defendants. The duty of seaworthiness is a contractual duty implied in contracts of carriage. *Horn v. Cia de Navigacion Fruco, S.A.,* 404 F.2d 422 (5th Cir. 1968), *cert. denied,* 394 U.S. 943, 89 S.Ct. 1272 (1969); *American Dredging Co. v. Plaza Petroleum Inc., supra,* 845 F. Supp. 91, 92-93. The duty to furnish a seaworthy vessel is the *carrier's* most fundamental obligation. *Graceline Inc. v. Todd Shipyards Corp.,* 500 F.2d 361, 369 (9th Cir. 1974) (emphasis added). Where the shipowner is not a party to the contract of carriage, the shipowner is not a "carrier" of the shipper's cargo and does not owe the carrier's duties to the shipper. *Associated Metals & Minerals Corp. v. SS PORTORIA,* 484 F.2d 460, 462 (5th Cir. 1973); *Demsey & Associates, Inc. v. SS SEA STAR,* 461 F.2d 1009, 1015 (2d Cir. 1972). To sustain a claim for unseaworthiness, the shipper must establish that the vessel owner was a party to the contract of carriage. *Associated Metals & Minerals Corp., supra,* 484 F.2d 460, 462; *American Dredging Co. v.*

Plaza Petroleum Inc., supra, 845 F. Supp. 91, 92-93; *Sail America Foundation v. M/V T.S. PROSPERITY,* 778 F. Supp. 1282, 1285 (S.D.N.Y. 1991); *Glynwed Steels Limited v. Great Lakes and European Lines, Inc.,* 1979 AMC 1290, 1291-92 (N.D. Il. 1978). That relationship has not been established here.

9. This case is unusual in that the bills of lading for the subject cargo were released and negotiated prematurely, before the *M/V SINGAPORE VICTORY* even reached Los Angeles. Consequently the bills of lading were not issued pursuant to the authority conferred in Clauses 8 and 50 of the Asean-Cormorant charter party, which required that the bills of lading be issued "in conformity with the mate's receipts." The mate's receipts were never attached to the bills of lading, and thus receipt of the goods aboard the vessel was not verified as is the typical practice.

10. The result of Cormorant's premature release and plaintiff's negotiation of the bills of lading was to deprive the vessel owner of the carrier's rights and defenses afforded by the U.S. Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. § 1300 *et seq.*, because the vessel owner never became a party to the bills of lading. For example, the bill of lading contains a provision which excuses delayed delivery of the goods. Because of the fact the shipowner never became a party to the bill of lading, it was precluded from taking advantage of that escape clause. It would be inequitable to allow plaintiff to recover from defendants the very damages defendants could have avoided had the bills of lading been released and negotiated in the typical and customary manner.

11. Accordingly, the Court finds for defendants and against plaintiff on the unseaworthiness claim.

12. Plaintiff's fraud claims are all legally unsupportable in that plaintiff has failed to prove the required *scienter*. Defendants are entitled to prevail on all fraud claims, however denominated.

13. Any finding of fact which is more appropriately considered to be a conclusion of law shall be considered a conclusion of law. Any conclusion of law which is more appropriately considered to be a finding of fact shall be considered a finding of fact.

14. All the claims having been addressed, the Court finds for defendants and against plaintiff on all plaintiff's claims. Judgment is to be entered accordingly.

Dated: Mar 8 1995

/s/ John G. Davies
The Honorable John G. Davies
UNITED STATES DISTRICT
COURT JUDGE

SUBMITTED BY:

Dated: February 27, 1995

/s/ William H. Collier, Jr.
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APPENDIX E

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

BARKLEY SEED, INC. d/b/a PACIFIC SOUTHWEST SEED & GRAIN, INC., a corporation, Plaintiff, v. CORMORANT BULK CARRIERS, a corporation; The Vessel "SINGAPORE VICTORY," its engines, tackle, apparel, furniture and appurtenances; ASEAN SHIPPING, a corporation, Defendants. AND ALL RELATED ACTIONS AND CROSS ACTIONS.	IN ADMIRALTY NO. CV-89 6322 JGD (JRx) CONSOLIDATED WITH NO. CV-91 2583 JGD (JRx) JUDGMENT (Filed Mar. 8, 1995) JS-6

This action came on for trial on February 7, 1995, in the United States District Court, Central District of California, located at 265 West Temple Street, Los Angeles, California, before the Honorable John G. Davies, United States District Judge, presiding. The issues have been duly tried without a jury and decision having been rendered by the Court,

IT IS ORDERED AND ADJUDGED that plaintiff take nothing by its complaint, that the actions be dismissed on the merits and that defendants BOTELHO SHIPPING CORP., SINGCO MARITIME S.A., ASEAN CHARTERING CO., LTD. and FAIRMONT SHIPPING (H.K) LTD. recover from the plaintiff their costs incurred in accordance with a properly submitted cost bill.

Dated: Mar 8 1995

/s/ John G. Davies
Honorable John G. Davies
UNITED STATES
DISTRICT JUDGE

Submitted by:

Dated: February 27, 1995

/s/ William H. Collier, Jr.
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LTD.

APPENDIX F

LIST OF HOW THE CIRCUIT JUDGES OF THE UNITED STATES COURTS OF APPEALS HAVE VOTED ON THE QUESTION PRESENTED FOR REVIEW

Judges Who Voted to Bar All Economic Loss Under a *Robins* Analysis:	**Judges Who Voted to Allow Recovery of Economic Loss Under a *Kinsman* Tort Analysis:**
1st Cir.[1] Breyer, Ct. J. Rosenn, Ct. J. Torruella, Ct. J.	
	2d Cir.[2] Kaufman, Ct. J. Anderson, Ct. J. Feinberg, Ct. J.
3d Cir.[3] Aldisert, Ch. J. Sloviter, Ct. J.	**3d Cir.** Mansmann, Ct. J.

[1] Barber Lines A/S v. M/V DONAU MARU, 764 F.2d 50 (1st Cir. 1985).

[2] In re Kinsman Transit Co., 388 F.2d 821, 822 (2d Cir. 1968).

[3] Getty Rfg. & Mktg. Co. v. MT FADI B, 766 F.2d 829, 836 (3d Cir. 1985) (2-1 decision).

Robins Analysis:	*Kinsman* Analysis:
	4th Cir.[4] Butzner, Ct. J. Widener, Ct. J. Phillips, Ct. J.
5th Cir.[5] Clark, Ch. J. Gee, Ct. J. Reavley, Ct. J. Randall, Ct. J. Williams, Ct. J. Garwood, Ct. J. Jolly, Ct. J. Higginbotham, Ct. J. Davis, Ct. J. Hill, Ct. J.	**5th Cir.** Wisdom, Ct. J. Rubin, Ct. J. Politz, Ct. J. Tate, Ct. J. Johnson, Ct. J.
	6th Cir.[6] Edwards, Ch. J. Lively, Ct. J. Engel, Ct. J.

[4] Marine Navigation Sulphur Carriers, Inc. v. Lone Star Indus., 638 F.2d 700, 701 (4th Cir. 1981).

[5] Louisiana *ex rel.* Guste v. M/V TESTBANK, 752 F.2d 1019, 1020, 1035 (5th Cir. 1985) (en banc) (10-5 decision), *cert. denied sub nom.* White v. M/V TESTBANK, 477 U.S. 903 (1986) .

[6] In re Bethlehem Steel Corp., 631 F.2d 441, 442 (6th Cir. 1980), *cert. denied*, 450 U.S. 921 (1981).

Robins Analysis:	*Kinsman* Analysis:
9th Cir.[7] Wallace, Ch. J. Thompson, Ct. J. Thompson, D.J.[8]	
11th Cir. Six Circuit Judges[9]	**11th Cir.** Six Circuit Judges[10]

[7] Channel Star Excursions, Inc. v. Southern Pac. Transp. Co., 77 F.3d 1135 (9th Cir. 1996).

[8] District Judge sitting by designation.

[9] The 12 judges who participated in the en banc rehearing in Hercules Carriers, Inc. v. Florida, 728 F.2d 1359 (11th Cir.) (6-6 decision), *cert. denied*, 469 U.S. 835 (1984), were not identified by how they voted. The participating judges were Tjoflat, Ch. J., and Godbold, Hill, Fay, Vance, Kravitch, Johnson, Henderson, Hatchett, Anderson, Clark and Rodney, Ct. JJ. The opinion explains that these judges were evenly divided. 728 F.2d at 1359.

[10] *Id.*

(2)

Supreme Court, U.S.
FILED
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No. 96-1398

In The

Supreme Court of the United States

October Term, 1996

BARKLEY SEED, INC. d/b/a PACIFIC SOUTHWEST SEED & GRAIN, INC.,

Petitioner,

vs.

BOTELHO SHIPPING CORP., ASEAN CHARTERING CO., LTD., FAIRMONT SHIPPING (H.K.) LTD., and SINGCO MARITIME S.A.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should this Court re-examine its longstanding rule in *Robins Dry Dock* barring recovery of purely economic losses in unintentional maritime tort claims where:

(1) There is no conflict among the circuits in applying *Robins Dry Dock,* petitioner's arguments to the contrary notwithstanding;

(2) Petitioner's claim is barred by even the most stringent reading of *Robins Dry Dock*; and

(3) The trial court expressly found that petitioner was estopped from recovering on its negligence claim in any event by virtue of its premature negotiation of misdated bills of lading.

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STATEMENT OF THE CASE

This brief is filed on behalf of BOTELHO SHIPPING CORP., SINGCO MARITIME S.A., ASEAN CHARTERING CO., LTD., and FAIRMONT SHIPPING (H.K.) LTD. (collectively "Vessel Interests"), defendants and appellees below. Petitioner BARKLEY SEED, INC. d/b/a PACIFIC SOUTHWEST SEED & GRAIN, INC. is referred to as "BARKLEY." Defendant CORMORANT BULK CARRIERS is referred to as "Cormorant." The National Seed & Agriculture Service Company is referred to as "National Seed."

In late May or early June 1988, Barkley contracted to sell 20,001 metric tons of wheat seed to a Saudi Arabian cooperative, National Seed, providing National Seed with an option to purchase an additional 5,000 metric tons (RT, Feb. 9, 98:18-25). National Seed exercised that option (RT, Feb. 9, 103:13-18).

Under the terms of the letters of credit opened by National Seed for purchase of the wheat seed, Barkley was obligated to present "on board" bills of lading indicating that 10,000.5 metric tons of the cargo had been shipped from Los Angeles, California, by August 25, 1988, another 10,000.5 metric tons shipped by September 25, 1988, and the balance of 5,001 metric tons shipped by September 30, 1988, (RT, Feb. 9, 102:23-103:5; RT, Feb. 13, 13:9-10). Barkley contemplated a voyage length of approximately 40 days (RT, Feb. 13, 7:10-12).

In the summer of 1988, Barkley contracted with Cormorant for transportation of the wheat seed to Saudi Arabia (ER, 7 ¶ 13; RT, Feb. 9, 100:19-21). Originally,

Cormorant intended to use the M/V PHILIPPINE VICTORY to transport the second half of Barkley's shipment, departing from Los Angeles in September 1988 (RT, Feb. 9, 100:19-24).

On August 29, 1988, Cormorant contacted Vessel Interests with a proposal to charter the M/V SINGAPORE VICTORY, which at the time was in a shipyard in Japan undergoing repair (RT, Feb. 8, 112:6-11; Exhibit 5006; RT, Feb. 10, 199:17-20; Exhibit 5011). The parties reached an agreement on September 2, 1988. (RT, Feb. 8, 146:19-147:17; Exhibit 3). The charter party required Vessel Interests to deliver the vessel to Cormorant anytime between September 25, 1988, and October 5, 1988, at a point between Vancouver and the Columbia River, or at an equidistant point from Japan off the United States West Coast, at Cormorant's option (RT, Feb. 8, 132:11-133:25). Delivery after October 5 allowed Cormorant to cancel the charter party (ER, 8 ¶ 19; RT, Feb. 10, 201:18-204:15).

As of September 2, 1988, Vessel Interests did not know to what load port Cormorant intended to send the M/V SINGAPORE VICTORY, what cargo Cormorant intended to carry, whose cargo Cormorant had contracted to carry, to what discharge port Cormorant intended to direct the vessel or whether the cargo had any delivery deadline (RT, Feb. 8, 165:2-166:10; RT, Feb. 10, 185:24-186:20). Cormorant advised Barkley that it intended to use the M/V SINGAPORE VICTORY to transport Barkley's second shipment of wheat seed, consisting of 15,001.5 metric tons, to Saudi Arabia (RT, Feb. 9, 100:23-101:4).

On September 12, 1988, Cormorant first advised Vessel Interests that the M/V SINGAPORE VICTORY was to proceed to Los Angeles to load a cargo of bagged wheat seed bound for Saudi Arabia (RT, Feb. 8, 163:12-164:19; Exhibit 5022). During the voyage from Japan to Los Angeles, the M/V SINGAPORE VICTORY encountered mechanical problems. Vessel Interests advised Cormorant that the vessel would not arrive at the delivery point, approximately two days west of Los Angeles, by the October 5 charter party cancellation date (RT, Feb. 8, 220:11-221:13; Exhibit 5038). Vessel Interests requested that Cormorant extend the cancellation date to October 12. Cormorant agreed to do so (RT, Feb. 8, 223:10-16; RT, Feb. 8, 226:22-227:7; Exhibit 5048).

The vessel was thereafter timely delivered to Cormorant on October 12 and arrived in Los Angeles on October 14 (ER, 8 ¶ 22). All of Barkley's cargo was loaded aboard the vessel by October 20, 1988 (ER, 9 ¶ 20). The M/V SINGAPORE VICTORY departed Los Angeles on October 22, 1988 and arrived in Dammam, Saudi Arabia on December 7, 1988 (ER, 9 ¶¶ 25 and 28). The vessel averaged approximately 11 knots on the 47-day voyage to Saudi Arabia (Exhibit C, Appendix A, pp. 8-9). Cargo discharging operations concluded on December 12, 1988, with all of the cargo delivered undamaged (ER, 9 ¶ 29).

Because Barkley had failed to comply with the September 25 and September 30 letter of credit loading deadlines, Barkley was in breach of its contracts with National Seed. Notwithstanding the fact that the vessel was not yet in Los Angeles, much less loaded, Cormorant's agent issued bills of lading to Barkley that reflected that the cargo was loaded on board as of the letter of credit

deadlines (ER, 8 ¶¶ 20 and 21). Barkley received the misdated bills of lading on October 6, 1988 and immediately submitted them to the bank for payment under the letters of credit, even though Barkley knew that the cargo was not on board the M/V SINGAPORE VICTORY (RT, Feb. 9, 147:7-24; RT, Feb. 9, 137:7-139:10; RT, Feb. 9, 153:9-22).[1] Barkley concedes that it did not ask National Seed for an extension of the letters of credit loading deadlines to allow later loading after Cormorant agreed to extend the charter party canceling date, because National Seed likely would have demanded certain "consideration" from Barkley in exchange for the extensions (RT, Feb. 13, 70:21-71:16).

Barkley never told National Seed (1) that the M/V SINGAPORE VICTORY was delayed in departing Sasebo, Japan; (2) that the vessel encountered mechanical difficulties en route to Los Angeles; (3) that the cargo was not loaded aboard the vessel until October 20; (4) that the vessel would not arrive in Dammam by the November 15 deadline; and (5) that Barkley Seed had negotiated the antedated bills of lading knowing that the cargo was not aboard the M/V SINGAPORE VICTORY on the dates reflected on the bills of lading (RT, Feb. 13, 18:21-19:6; 21:14-22:1; 25:2-6; 35:20-22; 39:20-40:16; 51:7-10).

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[1] Knowingly negotiating a misdated bill of lading is a misdemeanor punishable by five years imprisonment and/or a fine of up to $5,000. 49 U.S.C.A. § 121, repealed and superseded by 49 U.S.C.a. § 80116. *United States v. Aadal*, 280 F. Supp. 862 (S.D.N.Y. 1967) *affirmed* 407 F.2d 381 (2d Cir.) *cert. denied*, 395 U.S. 967, 89 S. Ct. 2114, 23 L. Ed. 2d 754 (1969).

The planting season in Saudi Arabia in 1988 extended until mid-February 1989 (ER, 7 ¶ 12). In the northern regions, planting is intentionally delayed until after mid-December to avoid frost damage (RT, Feb. 16, 36:16-20). After discharge from the vessel, the wheat seed could be distributed to farmers within five to eight day (RT, Feb. 10, 25:2-11). Accordingly, the wheat seed delivered aboard the M/V SINGAPORE VICTORY arrived in time for planting in the 1988-89 season.

National Seed began purchasing 10,000 metric tons of wheat in Saudi Arabia on November 19, 1988, ostensibly to deliver as seed to farmers (ER, 38 ¶ 20). But National Seed had to convert the wheat into seed. That process involved germination testing, cleaning the seed, treating it with a fungicide, bagging the seed and distributing it to farmers (RT, Feb. 10, 31:9-35:11). There were only two cleaning machines in Saudi Arabia, with a capacity of 500 tons per day (RT, Feb. 10, 35:3-11).

ARGUMENT

A. THERE IS NO CONFLICT AMONG THE CIRCUITS IN APPLYING ROBINS DRY DOCK TO PRECLUDE RECOVERY IN TORT ABSENT PHYSICAL DAMAGE.

As Barkley concedes, the First, Third, Fifth, Ninth and Eleventh Circuits have all expressly adopted the bright line rule precluding recovery of economic loss absent physical damage to a proprietary interest in an

admiralty unintentional tort action.[2] Contrary to Barkley's assertion, however, the Second and Fourth Circuits have also expressly followed the *Robins Dry Dock* doctrine, and the Sixth Circuit has never addressed the issue.

1. The Second Circuit has Repeatedly Applied *Robins Dry Dock.*

The Second Circuit has expressly followed *Robins Dry Dock. Federal Commerce & Navigation Co. v. M/V MARATHONIAN,* 528 F.2d 907, 908 (2d Cir. 1975), *cert. denied,* 425 U.S. 975, 96 S. Ct. 2176, 48 L.Ed. 2d 799 (1976). In that case, decided seven years after *Kinsman II,*[3] a case relied upon principally by petitioner to support its assertion of a purported conflict (Petition, p. 8), the Second Circuit affirmed the district court's dismissal of a time charterer's claim for economic losses sustained while the chartered vessel was out of service for repair of collision damages caused by defendant's negligence. The Second Circuit also expressly noted that the Supreme Court had not retreated from the bright line rule announced in *Robins Dry Dock. Federal Commerce,* 528 F.2d at 908.

District courts within the Second Circuit have also applied the *Robins Dry Dock* rule in admiralty tort cases without any mention of the *Kinsman* analysis. *Plaza Marine, Inc. v. Exxon Corporation,* 814 F. Supp. 334, 335 (S.D.N.Y. 1993) (applying *Robins Dry Dock* physical damage requirement in action for economic losses arising

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[2] Petition for Writ of Certiorari (the "Petition"), p. 8, fn.16 and accompanying text.

[3] *In Re Kinsman Transit Co.,* 388 F.2d 821 (2d Cir. 1968).

from closure of waterway to navigation caused by defendant's negligent discharge of oil); *American Dredging Co. v. Plaza Petroleum, Inc.*, 845 F. Supp. 91, 93 (E.D.N.Y. 1993) (denying recovery of pecuniary damages to buyer of contaminated fuel, citing a trend in tort law against recovery of purely economic losses in negligence actions).

Accordingly, Barkley has cited no case from either the Second Circuit or district courts within the Second Circuit which rejects *Robins Dry Dock* and follows *Kinsman* in an admiralty unintentional tort claim. Moreover, contrary to Barkley's contention, if Barkley had sued Vessel Interests in the Second Circuit, the district court would have been required to follow *Federal Commerce* not *Kinsman*, as Barkley's interests are identical to the charterers in *Robins Dry Dock* and *Federal Commerce* (*i.e.*, Barkley allegedly sustained economic loss without damage to a property interest because of delays associated with repairs to a vessel Barkley had contracted to use.)

2. The Fourth Circuit Has Continually applied *Robins Dry Dock*.

In *Venore Transportation Co. v. M/V STRUMA*, 583 F.2d 708 (4th Cir. 1978), the Fourth Circuit specifically endorsed the validity of the *Robins Dry Dock* doctrine, even though distinguishing its application to the facts before it. The *Venore* court also cited various prior Fourth Circuit (and other circuit) decisions following the *Robins Dry Dock* rule: *Rederi A/B Soya v. Evergreen Marine Corporation*, 1972 A.M.C. 538 (4th Cir. 1972), *affirming* 1972 A.M.C. 1555 (E.D. Va. 1971) (*Robins Dry Dock* binding on lower courts); *Henderson v. Arundel Corporation*, 384 F.2d

998 (4th Cir. 1967), *affirming* 262 F. Supp. 152, 158-160 (D. Md. 1966) (*Robins Dry Dock* precluded claim by seamen for lost wages and subsistence from vessel which struck dredge, disabling it for six weeks); *General Foods Corporation v. United States*, 448 F. Supp. 111 (D. Md. 1978). *Venore Transportation*, 583 F.2d at 710.

The *Venore* court was especially careful to note that its holding, which was consistent with *Robins Dry Dock*, *id.* at 711, was limited to allowing a charterer to recover charter hire paid during the time a vessel was out of service for collision repairs. Reasoning that the vessel owner would be entitled to recover that loss if payment of charter hire had been suspended, it was only logical to allow recovery of those collision-related losses when payment was not suspended. *Id.* Other economic losses, such as lost profits, were not recoverable. *Id.*

In *Marine Navigation Sulphur Carriers, Inc. v. Lone Star Industries, Inc.*, 638 F.2d 700 (4th Cir. 1981), the Fourth Circuit did not even mention *Robins Dry Dock*, apparently because the parties did not raise that issue.[4] Moreover, that court affirmed dismissal of various claims by businesses for economic losses unaccompanied by physical injury arising from a vessel-bridge collision on the ground that the claims were too remote. *Marine Navigation* has since been recognized as supporting the bright line rule precluding recovery of economic losses without damage to property. *Cleveland Tankers, Inc. Limitation Proceedings*, 791 F. Supp. 669, 673 n.3 (E.D. Mich. 1992).

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[4] Barkley cites *Marine Navigation* as evidence that "the Fourth Circuit rejected the applicability of *Robins*. . . ." (Petition, p. 17.)

In short, Barkley also fails to cite a single case from either the Fourth Circuit or district courts within the Fourth Circuit which rejects *Robins Dry Dock* in an admiralty unintentional tort claim. Accordingly, its argument that the Second and/or Fourth Circuits are in conflict with the remaining circuits in this application of *Robins Dry Dock* draws no support from existing case law.

3. The Sixth Circuit Has Never Even Considered *Robins Dry Dock*.

Barkley is similarly mistaken when it contends that the Sixth Circuit's decision in *In re Bethlehem Steel Corp.*, 631 F.2d 441 (6th Cir. 1980), *cert. denied*, 450 U.S. 421, 101 S. Ct. 1370, 67 L. Ed. 2d 349 (1981), "expressly adopted the Kinsman Transit approach" (Petition, p. 17). In that case, a ship struck a bridge in Canadian waters, resulting in closure of a canal for approximately two weeks. The closure caused economic losses unaccompanied by physical damage to owners and charterers of vessels detained by the accident. The offending shipowner filed a limitation of liability action in Canadian courts, but several claims were filed in U.S. District Court for the Northern District of Ohio, prompting the ship owner to file a second limitation action in Ohio.

The Canadian court dismissed the claims asserted by vessel owners and charterers which sought recovery of purely economic losses on the ground that even foreseeable, proximately caused economic harm unaccompanied by physical injury is generally not compensable under Canadian law. (631 F.2d at 443-444.) The district court in

the United States, applying Canadian law, similarly dismissed the claims asserted by ship owners who sought vessel detention damages. (631 F.2d at 446.)

On appeal, the claimants argued that (1) the Canadian trial court and the district court misstated the applicable Canadian law regarding compensability of negligently caused economic losses unaccompanied by physical damage to person or property, and (2) an "overriding domestic policy translated into law" mandates recovery of such damages in U.S. courts. *Bethlehem Steel*, 631 F.2d at 446. After summarily rejecting the claimants' first argument, the Sixth Circuit held that the claimants had not sustained their burden of proving "the existence of an overriding policy of the United States which is different from that of Canada on the question of permitting recovery for economic loss in the absence of physical injury." *Bethlehem Steel*, 631 F.2d at 448.

The *Bethlehem Steel* court addressed *Petition of Kinsman Transit Co.*, 388 F.2d 821 (2d Cir. 1968) only because the claimants argued that it represented the United States' "overriding domestic policy" on the issue of economic loss. The court did not address or consider *Robins Dry Dock*. By affirming the district court's dismissal of the claims under Canadian law, the Sixth Circuit neither adopted *Kinsman* nor rejected the *Robins Dry Dock* doctrine. *Cleveland Tankers, Inc. Limitation Proceeding*, 791 F. Supp. 669, 675-76 (E.D. Mich. 1992) (district court within Sixth Circuit explaining *Bethlehem Steel* court's ruling, and expressly rejecting *Kinsman Transit* analysis and following *Robins Dry Dock*); *Complaint of Great Lakes Towing Co.*, 395 F. Supp. 810, 811 (N.D. Ohio 1974) (recognizing and applying "well-established" admiralty rule that precludes

recovery in tort absent physical damage to a property interest).

Therefore, as with the Second and Fourth Circuits, Barkley has cited no case from either the Sixth Circuit or district courts within the Sixth Circuit which rejects *Robins Dry Dock* in an admiralty unintentional tort claim. Barkley has failed to provide this Court with any evidence, whatsoever, of actual conflict among the circuits in the application of *Robins Dry Dock*.

4. Barkley's Reliance Upon Various Dissenting Opinions Does Not Demonstrate The Existence of a Conflict.

Perhaps the most telling indication of the absence of any split among the circuits is the fact that Barkley relies so heavily upon the *dissenting* opinions in *Getty* and *Testbank*.[5] Moreover, Barkley does not analyze the Fourth and Sixth Circuit cases that it contends give rise to a split among the circuits, perhaps because as discussed above, those cases do not support Barkley's contention of a split. Indeed, as set forth above, other authorities from the Second, Fourth and Sixth Circuits confirm that the *Robins Dry Dock* doctrine remains the law within those circuits. Even *Kinsman II* cites *Robins Dry Dock* with approval and explains in an accompanying footnote that, in a typical delay case, foreseeable economic losses would not be recoverable absent physical injuries. *Kinsman II*, 388 F.2d at 825 n. 8.

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[5] Petition, p. 8 fn. 17, p. 13 fn. 45, p. 14 fns. 55-58, and p. 30.

In the face of an overwhelming body of authorities applying *Robins Dry Dock,* Barkley has not cited a single federal maritime case in which a claimant (other than a commercial fisherman) recovered economic losses without accompanying physical damages to a property interest in an admiralty unintentional tort action. Every circuit that has considered *Robins Dry Dock* has applied it.[6] There simply is no split among the circuits.

B. THIS COURT'S DECISIONS IN *EAST RIVER* AND *THE SUCARSECO* DISPEL ANY NOTION THAT IT HAS RETREATED FROM ITS POSITION IN *ROBINS DRY DOCK.*

No discussion of the issue of recovery in tort of economic losses unaccompanied by physical damage is complete without consideration of this Court's decision in *East River Steamship Corp. v. Transamerica Delaval Inc.,* 476 U.S. 858, 106 S. Ct. 2295, 90 L. Ed. 2d 865 (1986).[7] In

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[6] Two district courts in the Eighth Circuit have also followed *Robins Dry Dock: Matter of Williamson Leasing Co., Inc.,* 577 F. Supp. 890, 891-92 (E.D. Mo. 1984) (denying recovery of lost wages and employment benefits to railroad workers who sustained loss of employment caused by vessel's collision with railroad bridge that resulted in temporary shutdown of bridge); *Cahokia Marine Service v. American Barge & Towing,* 635 F. Supp. 830, 833 (E.D. Mo. 1986).

[7] This Court in *East River* stated in a footnote that it was not reaching the broader issue of "whether a tort cause of action can ever been stated in admiralty when the only damages sought are economic." 476 U.S. at 87, 106 S. Ct. 2295, 90 L. Ed. 2d at 877, fn. 6. The commonality of principles, however, is irrefutable. Moreover, the Court in *East River* cited *Robins Dry Dock* with approval. 476 U.S. at 874, 106 S. Ct. 2295, 90 L. Ed. 2d at 879.

East River, this Court held that a plaintiff could not maintain a products liability claim in admiralty where the only harm asserted is economic loss caused by the product injuring itself. In that case, companies that had bareboat chartered four tank vessels filed an action against the manufacturer of the main propulsion engine's turbine that was damaged when the turbine malfunctioned due to design and installation defects. Plaintiffs asserted tort theories of negligence and strict liability for repair costs and economic losses. In denying plaintiffs any recovery, this Court cited *Robins Dry Dock* and explained that a product damaging itself is most properly the subject of a warranty claim:

> A warranty action also has a built-in limitation on liability, whereas a tort action could subject the manufacturer to damages of an infinite amount. The limitation in a contract action comes from the agreement of the parties and the requirement that consequential damages, such as lost profits, be a foreseeable result of the breach. (Citations omitted.) In a warranty action where the loss is purely economic, the limitation derives from the requirements of foreseeability and of privity, which is still generally enforced for such claims in a commercial setting. (Citation omitted.)
>
> In products liability law, where there is a duty to the public generally, foreseeability is an inadequate brake. (Citations omitted.) Permitting recovery for all foreseeable claims for purely economic loss could make a manufacturer liable for vast sums.

476 U.S. at 871-75, 106 S. Ct. 2295, 90 L. Ed. 2d 865, 877-79.[8]

The dichotomy recognized by this Court is clear: Recovery of economic loss is exclusively within the province of contract and warranty law, while tort law is available solely to compensate for physical injuries to persons or "other property" in admiralty actions. While *East River* is a products liability case involving a defective product that damaged itself resulting in economic losses, it serves to illustrate a critical point: Where a product has not met a customer's expectations, or where the customer is disappointed in a product's performance, a breach of contract warranty action adequately safeguards against foreseeable economic losses.

Here, Barkley contracted to use a vessel. Barkley was disappointed with the vessel's performance, but Barkley's cargo was delivered undamaged to its proper destination. Therefore, Barkley's only claim is for alleged economic losses resulting from a brief delay in delivery. Under those circumstances, Barkley is limited to recovering *in contract* since Barkley's contention is that it did not receive the benefit of its bargain from the party with whom it contracted to transport its goods (*i.e.*, Cormorant).[9] Moreover, if Vessel Interests' negligence had

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[8] This Court explained that contract warranty law adequately protects against economic loss so that permitting recovery for purely economic losses under negligence or strict liability could cause contract law to "drown in a sea of tort." *East River*, 476 U.S. at 866.

[9] Barkley's president, Stephen Leffler, testified that so long as the vessel arrived in Saudi Arabia in a timely fashion, the

proximately caused physical damage to Barkley's cargo (*e.g.*, if the hatch covers leaked allowing incursion of salt water into the cargo holds, or if the cargo holds were contaminated with vermin and damaged the cargo), Barkley could recover proximately resulting losses.

Barkley's reliance upon this Court's 1935 opinion in *Aktieselskabet Cuzco v. The Sucarseco*, 294 U.S. 394, 55 S. Ct. 467, 79 L. Ed. 942 (1935), is also misplaced. *The Sucarseco* involved claims arising out of the archaic maritime doctrine of "general average" pursuant to which cargo owners must contribute as participants in a common adventure with the carrying vessel to avoid a "common imminent peril" by making a "voluntary sacrifice" or incurring "extraordinary expenses." *Id.* at 401. This Court there stated:

> The claim of the cargo owners for their general average contributions is not in any sense a derivative claim. It accrues to the cargo owners in their own right. It accrues because of cargo's own participation in the common adventure and the action taken on behalf of cargo and by its representative to avert a peril with which that adventure was threatened. Being cargo's own share of the expense incurred in the common

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speed made by the vessel during the voyage was of no concern to him. (RT, Feb. 13, 72:12-20.) That testimony illustrates why Barkley's claim can only be asserted as a contract claim. If the M/V SINGAPORE VICTORY had departed Los Angeles September 29 and performed exactly as it did on the subject voyage, it would have arrived in Saudi Arabia on November 15 and there would be no claim. The fact that the vessel departed Los Angeles October 22 does not transform Barkley's breach of contract claim into a tort.

> interest, the amount which is paid properly belongs in the category of damage which the cargo owners have suffered by reason of the collision.

Id. at 404.

In expressly distinguishing *Robins Dry Dock*, this Court in *The Sucarseco* stated that "cargo as well as ship was placed in jeopardy." *Id.* Cargo interests there paid a proportionate share of the physical damage caused by the collision. Those damages were not in any sense consequential or economic losses, as Barkley allegedly sustained here. *See also, Federal Commerce*, 528 F.2d at 908 (recognizing that *The Sucarseco* is inapposite to the *Robins Dry Dock* doctrine); *Mathiesen v. M/V OBELIX*, 817 F.2d 345, 347 (5th Cir.), *cert. denied*, 484 U.S. 898, 108 S. Ct. 234, 98 L. Ed. 2d 192 (1987).

Here, the wheat seed sustained no physical damage and was never "in jeopardy," and neither Barkley nor National Seed made any "sacrifice" or "extraordinary contribution" to "avert a common peril." *The Sucarseco* simply does not apply.

C. BARKLEY'S CLAIM IS BARRED BY EVEN THE MOST STRINGENT READING OF *ROBINS DRY DOCK*.

Barkley contracted with Cormorant for transport of its wheat seed from Los Angeles to Saudi Arabia (RT, Feb. 9, 100:19-101:3). Cormorant issued bills of lading to Barkley for carriage of the wheat seed (RT, Feb. 9, 145:12-16). Barkley's contention, couched in terms of general maritime law negligence against Vessel Interests, is that as a

result of Vessel Interests' alleged negligence in their maintenance and operation of the M/V SINGAPORE VICTORY, the vessel did not meet Barkley's expectations under its contracts (the bills of lading) with Cormorant.[10] But for the Barkley-Cormorant contract, Barkley would have no right to expect the M/V SINGAPORE VICTORY to be capable of making any particular speed.

This Court in *Robins Dry Dock* squarely rejected such claims. The charter party between Vessel Interests and Cormorant "imposed no immediate obligation upon" Vessel Interests to third persons. *Robins Dry Dock,* 275 U.S. at 308. Whether Vessel Interests performed the charter party "promptly or with negligent delay" was the business of Cormorant alone. *Id.* Barkley's alleged losses arose solely by virtue of its contract with Cormorant. *Id.* Under those circumstances, *Robins Dry Dock* precludes Barkley from recovering in tort from Vessel Interests. *Getty Rfg. & Mktg. Co. v. M/T FADI B,* 766 F.2d 829, 833-34 (3d Cir. 1985) (terminal operator sustained economic losses solely as a result of contracts with other vessels that could not dock due to defendants' negligence).

A case almost directly on point is *Louis Dreyfus Corp. v. 27,946 Long Tons of Corn,* 830 F.2d 1321 (5th Cir. 1987). In that case, a vessel owner (KMTC) contracted with a

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[10] Barkley is contending that Cormorant's breach of the bills of lading caused Barkley to breach its contract with National Seed, putting National Seed in potential breach of its contracts with Saudi farmers, leading to the alleged damages incurred by National Seed and Barkley. It is thus evident that the contracts ultimately interfered with (between National Seed and the Saudi farmers) were two contracts removed from Vessel Interests' alleged negligence.

shipper (Dreyfus) for transport of Dreyfus' grain. During loading, the vessel's engine room flooded due to a defective valve, resulting in economic damages to Dreyfus. Dreyfus filed suit against KMTC, the ship builder, and the valve system manufacturer. The Fifth Circuit affirmed the district court's award of damages to Dreyfus against KMTC, with whom Dreyfus shared privity of contract.

More significant for purposes of the Petition, however, the court also affirmed the district court's finding that Dreyfus' claims against the ship builder and valve manufacturer were barred by *Robins Dry Dock. Dreyfus*, 830 F.2d at 1328. In this case, Cormorant occupies the position of the contracting party (KMTC) in *Dreyfus*. Vessel Interests, on the other hand, occupy the position of the non-contracting defendants, as to whom *Robins Dry Dock* barred recovery.

Another case almost directly on point is *Cargill, Inc. v. Doxford & Sunderland, Ltd.*, 782 F.2d 496, *rehearing denied*, 785 F.2d 1296 (5th Cir. 1986). In that case, a vessel encountered engine difficulties while carrying a shipper's grain. After the shipper ultimately removed the grain from the ship, it sued the shipyard allegedly responsible for the engine failure, seeking to recover its economic losses. In rejecting the shipper's claim, the court explained its reasoning:

> There can be no recovery in tort unless the defendant has breached a legal duty owed to the plaintiff. . . . If [the shipyard] caused or contributed to the malfunction of the SERENA's engine, it did not thereby breach any legal duty owed to [the shipper]. . . . [The shipper's] injury and [the

> shipyard's] allegedly wrongful acts were related only in that these acts prevented the SERENA or her owner from performing a contract with [the shipper]; that the breach of this contract may have arisen directly from [the shipyard's] negligent repair of the SERENA's engine could not give [the shipper] any right to recovery in tort against [the shipyard].

782 F.2d at 498-99.

Accordingly, since Barkley's alleged economic loss was caused by Cormorant's failure to perform its contractual obligations, Barkley's remedy, if any, is against Cormorant in contract, and not against Vessel Interests in tort. *Robins Dry Dock; Cargill; see also, Holt Hauling & Warehousing Systems, Inc. v. M/V MING JOY,* 614 F. Supp. 890 (E.D. Pa. 1985). Barkley's negligence claim here is another example of an overreaching plaintiff contributing to what has been referred to as the "tortification of contract law." *Oki America, Inc. v. Microtech Intl., Inc.,* 872 F.2d 312, 315 (9th Cir. 1989) (Kozinski, C.J., concurring).

D. BARKLEY'S MISCONDUCT IN PREMATURELY NEGOTIATING THE MISDATED BILLS OF LADING ESTOPS IT FROM RECOVERING AGAINST VESSEL INTERESTS AND OBVIATES THIS COURT'S NEED TO EXAMINE *ROBINS DRY DOCK.*

The district court ruled that irrespective of the *Robins Dry Dock* doctrine, Barkley was estopped from recovering on its negligence claim because its negotiation of the

misdated bills of lading was a substantial factor contributing to the alleged loss. (Appendix D to Petition, pp. 32-33, ¶ 34.)

Barkley concealed material information from its assignee, National Seed, by failing to inform National Seed about the vessel's mechanical problems and resulting delays. Once Barkley submitted the misdated bills of lading and collected full payment from National Seed under the letters of credit, National Seed reasonably believed that the cargo had been loaded on schedule and would arrive in Saudi Arabia when expected.[11] The misdated bills of lading and other false information disseminated by Barkley created a climate of uncertainty and concern at National Seed. Those feelings led National Seed to prematurely and unnecessarily purchase wheat to use as "cover" seed, causing most of the alleged economic losses.

It would be manifestly unjust to allow Barkley to benefit from its fraud against National Seed, by taking an assignment of National Seed's damages resulting from that fraud and then recovering them in a negligence action against Vessel Interests. For that reason, the district court correctly ruled that Barkley was estopped from asserting a negligence claim. Accordingly, this Court need not even consider the *Robins Dry Dock* doctrine in affirming the orders of the district court and the Ninth Circuit and denying the Petition.

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[11] Bills of lading and letters of credit are time-honored negotiable instruments, the integrity of which are the core of international business transactions.

CONCLUSION

Barkley's petition should be denied in its entirety. The circuit courts of appeals uniformly agree that the *Robins Dry Dock* doctrine is the law of the land. Moreover, Barkley's negligence claim is precluded even in the absence of *Robins Dry Dock*, by virtue of Barkley's premature negotiation of misdated bills of lading.

Dated: April 3, 1997

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(3)

Supreme Court, U.S.
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No. 96-1398

In The

Supreme Court of the United States

October Term, 1996

BARKLEY SEED, INC. d/b/a PACIFIC SOUTHWEST SEED & GRAIN, INC.,

Petitioner,

vs.

BOTELHO SHIPPING CORP., ASEAN CHARTERING CO., LTD., FAIRMONT SHIPPING (H.K.) LTD., and SINGCO MARITIME S.A.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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A. REPLY TO RESPONDENTS' CONTENTION THAT THERE IS NO CONFLICT AMONG THE CIRCUITS

Respondents say there is no conflict in the circuits on the issue presented for review,[1] but their claim that the Second, Fourth and Sixth Circuits apply the bright-line *Robins*[2] rule is contradicted by those courts' decisions and by the legal commentators who discern in them a circuit conflict.

In the *Journal of Maritime Law & Commerce*, the leading periodical in the field of admiralty and maritime law, David R. Owen, a former president of the Maritime Law Association of the United States, discussing the majority's *Robins* bright-line rule, explained that "[o]ther circuits have rejected the bright line *per se* approach as not mandated by *Robins*. They have limited liability by a case-by-case application of traditional tort criteria of foreseeability, proximate cause, remoteness, etc."[3] Owen analyzed the Second Circuit's rejection of *Robins* as a bar to economic recovery in *In re Kinsman Transit Co.*,[4] a case that "has been of far-reaching importance on the theory of recovery for economic loss."[5] This importance derives from the fact that "[t]wo other circuits have expressly adopted the *Kinsman* approach"[6] and that "*Kinsman* has become the central rallying point for those who dislike the bright line approach."[7] Owen discussed the express

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[1] Brief in Opposition ("Opp. Brief") at 5-12.

[2] Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303 (1927).

[3] David R. Owen, *Recovery for Economic Loss Under U.S. Maritime Law: Sixty Years Under* Robins Dry Dock, 18 J. MAR. L. & COMM. 157, 166 (1987).

[4] 388 F.2d 821 (2d Cir. 1968); Owen, *supra* note 3, at 166-68.

[5] Owen, *supra* note 3, at 166.

[6] *Id.* at 168.

[7] *Id.* at 167 (citing the dissenting opinions in Getty Rfg. & Mktg. Co. v. MT FADI B, 766 F.2d 829, 836 (3d Cir. 1985) (2-1

adoption of the *Kinsman* approach by the Sixth Circuit in *In re Bethlehem Steel Corp.*[8] and by the Fourth Circuit in *Venore Transportation Co. v. M/V STRUMA*[9] and *Marine Navigation Sulphur Carriers, Inc. v. Lone Star Industries.*[10]

Writing in the *University of San Francisco Maritime Law Journal*, Francis J. Gonynor analyzed the Second Circuit's rejection of *Robins* in *Kinsman*,[11] and explained that "[t]he Fourth and Sixth Circuits on several occasions have taken the opportunity to adopt the *Kinsman* approach in handling analogous situations. . . . [12] Explaining that "[t]here is now a clear split in the United States circuit courts of appeals on how to address the issue,"[13] another commentator summarized the conflict: "The First, Third, Fifth and Eleventh Circuits construe Robins to bar recovery for all economic loss. . . . The Second, Fourth, Sixth and Ninth Circuits construe Robins to allow recovery for economic loss if the losses are sufficiently direct."[14]

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decision) (Mansmann, J., dissenting) and in Louisiana *ex rel.* Guste v. M/V TESTBANK, 752 F.2d 1019, 1035 (5th Cir. 1985) (en banc) (10-5 decision) (Wisdom, J., dissenting); and other cases).

[8] 631 F.2d 441 (6th Cir. 1980), *cert. denied*, 450 U.S. 921 (1981); Owen, *supra* note 3, at 168-69.

[9] 583 F.2d 708 (4th Cir. 1978); Owen, *supra* note 3, at 169.

[10] 638 F.2d 700 (4th Cir. 1981); Owen, *supra* note 3, at 170.

[11] Francis J. Gonynor, *The* Robins Dry Dock *Rule: Is the "Bright Line" Fading?*, 4 U.S.F. MAR. L.J. 85, 89-91 (1992).

[12] Gonynor, *supra* note 11, at 90 (citing *Marine Nav.* (4th Circuit) and *Bethlehem Steel* (Sixth Circuit).

[13] James W. Shephard, *The Murky Waters of* Robins Dry Dock: *A Comparative Analysis of Economic Loss in Maritime Law*, 60 TUL. L. REV. 995, 1010-11 (1986).

[14] *Id.* at 1011 n.88. This was written ten years before the Ninth Circuit reversed itself in Channel Star Excursions, Inc. v. Southern Pac. Transp. Co., 77 F.3d 1135 (9th Cir. 1996).

Respondents cite no decision of the Second, Fourth or Sixth Circuits that rejects the *Kinsman* approach and prohibits all claims for economic loss. *The MARATHONIAN*,[15] decided by the Second Circuit seven years after *Kinsman*, does not overrule *Kinsman*. *The MARATHONIAN* noted that the district court had "reluctantly" dismissed a time-charterer's claim based on *Robins*,[16] and for itself said: "If free to do so, we might question whether at least the damage to the principal time charterer is not so reasonably to be expected as to justify recovery,"[17] citing *Kinsman*.[18] The panel considered the time-charterer's claim identical to that of the time-charterer in *Robins*: "The first claim is somewhat more substantial, for the basis for denial of relief to the time charterer in *Robins* has come under strong scholarly criticism."[19] This is why the court considered *Robins*, "which denied relief for damages sustained by a time charterer,"[20] rather than *Kinsman*, controlling.

The MARATHONIAN followed *Robins* because it was a time-charterer case. The panel did not reject or overrule *Kinsman*, but expressed the Second Circuit's conviction that *Robins* is a mistake that should be remedied: "If free to do so. . . . "[21] The panel decided it was not free to allow the time-charterer a recovery because *Robins* could be overruled only by this Court: "In any case, 'the Supreme

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[15] Federal Comm. & Nav. Co. v. M/V MARATHONIAN, 528 F.2d 907 (2d Cir. 1975), *cert. denied*, 425 U.S. 975 (1976).

[16] *Id.* at 907.

[17] *Id.* at 908.

[18] 388 F.2d at 823-24.

[19] 528 F.2d at 908 (citing F. James, *Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal*, 25 Vand. L. Rev. 43, 55-57 (1972); F. Harper & F. James, THE LAW OF TORTS § 6.10 at 501-05 (1956); and W.L. PROSSER, LAW OF TORTS § 129, at 939, 940 (4th ed. 1971)).

[20] 528 F.2d at 907.

[21] *Id.* at 908.

Court should retain the exclusive privilege of overruling its own decisions, save perhaps when opinions already delivered have created a near certainty that only the occasion is needed for pronouncement of the doom.'"[22]

B. REPLY TO RESPONDENTS' CHARACTERIZATION OF THIS COURT'S DECISIONS IN *EAST RIVER* AND *THE SUCARSECO*

This Court's decision in *East River S.S. Corp. v. Transamerica Delaval, Inc.*[23] expressly reserved decision of the issue presented for review,[24] and thus is not a basis for denying this petition, as respondents claim.[25]

Respondents characterize the "damages" paid by cargo in *The SUCARSECO*[26] as collision damages, emphasizing the presence of physical damage.[27] But the physical damage that triggered the cargo owners' payment of general average contributions was not damage to their cargoes, but to the carrying vessel, *which they did not own*. *The SUCARSECO* allowed recovery of purely economic losses (the cargo owners' general average contributions) although the losses were caused by damage to someone else's property. Moreover, the cargo owners paid the general average contributions under a clause in the carrier's bill of lading that required cargo to contribute to the cost of repairing the ship should it be damaged during the

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[22] *Id.* (quoting Salerno v. American League of Professional Baseball Clubs, 429 F.2d 1003, 1005 (2d Cir. 1970)).

[23] 476 U.S. 858 (1986).

[24] *Id.* at 871 n.6.

[25] Opp. Brief at 12-15.

[26] Aktieselskabet Cuzco v. The SUCARSECO, 294 U.S. 394 (1935).

[27] *Id.* at 16.

voyage.[28] Since the cargo owners suffered economic losses absent physical damage to their own property as the result of a negligent interference with contract, the only way to square *The SUCARESECO* with this Court's earlier *Robins* ruling is to view *Robins*, as *The SUCARSECO* did, as a case turning on the *remoteness* of the loss[29] rather than on physical damage to a proprietary interest or negligent interference with contract.

C. REPLY TO RESPONDENTS' "STRINGENT" READING OF *ROBINS*

Respondents misstate the similarity between this case and *Robins*.[30] The two are not analogous. Unlike the ship repairer in *Robins*, respondents were in actual possession, custody and control of petitioner's property. The remoteness which this Court descried between the repairer's tort and the charterer's contract in *Robins* does not exist here. Respondents cannot claim lack of knowledge of the cargo aboard their own vessel. They knew what they had loaded, where they had loaded it, and where they were to take it. There is no *Robins* remoteness here. Petitioner is not claiming for economic damages from the loss of use of someone else's ship, as in *Robins*; it is claiming for damages caused by the loss of use of *its own property* – the wheat seed.

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[28] *Id.* at 404-05.

[29] *Id.*; *see also* Pet. for Cert. at 21.

[30] Opp. Brief at 16-17.

Respondents' citation to *Louis Dreyfus Corp. v. 27,946 Long Tons of Corn*[31] and *Cargill, Inc. v. Doxford & Sunderland, Ltd.*[32] adds nothing to the discussion. The *TEST-BANK* decision[33] required the Fifth Circuit panels in *Dreyfus* and *Cargill* to reject out-of-hand the cargo owners' claims for economic loss. It does not follow from this that *Robins* should have controlled the outcome in either case. Unlike the charterer in *Robins*, both Dreyfus and Cargill actually lost the use of their own, rather than someone else's, property. Both *Dreyfus* and *Cargill* should have been decided under *The SUCARSECO*,[34] not under *Robins*. Like the cargo owners in *The SUCARSECO*,[35] Dreyfus and Cargill should have been allowed to recover the damages they suffered when the ship carrying their goods became disabled. *Dreyfus*, *Cargill* and this case all demonstrate that many of the claims barred by the economic loss doctrine are easily distinguishable from *Robins*. Both *Robins* and the expansionist doctrine founded upon it fail to provide any intellectual apparatus for explaining why a tortfeasor should have no duty of care not to impair a person's use of *his own property*.

In asking this Court to provide an intellectual apparatus for determining claims for economic loss, petitioner is not "an overreaching plaintiff" contributing to the " 'tortification of contract law.' "[36] Petitioner simply asks this Court to recognize a cause of action for economic loss

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[31] 830 F.2d 1321 (5th Cir. 1987).

[32] 782 F.2d 496, *rehearing denied*, 785 F.2d 1296 (5th Cir. 1986).

[33] 752 F.2d 1019.

[34] 294 U.S. 394.

[35] *Id.* at 405.

[36] Opp. Brief at 19.

that was foreseeably and proximately caused by a tortfeasor's breach of duty. Petitioner does not ask this Court to reject the principle of *remoteness*, the key element in *Robins*, but on the contrary to apply it to the facts of each case, rather than reject all economic claims regardless of duty, breach, foreseeability and proximate cause.

D. REPLY TO RESPONDENTS' ESTOPPEL ARGUMENT

Respondents' contention that petitioner is barred from recovery by virtue of its negotiation of the bills of lading issued by Cormorant,[37] a defendant in the underlying action, ignores the *res judicata* effect of the district court's dismissal of respondents' counterclaim for fraud based on the dating of the bills of lading. Holding that respondents had no cause of action against petitioner for negotiating the bills of lading, the court explained: "[D]efendants should not be heard to say that they detrimentally relied on the misdescription in the dates of the bills of lading."[38] There was, the court found, no detrimental reliance on the dates in question.[39] The reference to estoppel in the district court's decision is there because respondents' counsel put it there. The court's findings and conclusions were submitted by respondents' counsel, not written by the court.[40] The issue of detrimental reliance is *res judicata*, as shown by the court's decision dismissing the counterclaims.

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[37] *Id.* at 19-20.

[38] Pet. for Cert. at App. 19-20 n.3.

[39] *Id.* "Thus, they did not rely on the misdescription in the bills of lading. . . . "

[40] *See* Pet. for Cert. at App. 38.

Moreover, the propriety of the finding (¶ 34) to which respondents refer was raised by petitioner and preserved on appeal.[41] Petitioner raised the issue that the court made numerous factual findings on damages issues, including mitigation, although it never tried the damages phase of the case.[42] It was unnecessary for the Ninth Circuit to address this issue after it ruled that petitioner's claim for economic loss was barred by law.[43] If this Court grants a writ of certiorari and overrules the court below on the issue presented for review, then the court of appeals, on remand, will have to decide whether the district court abused its discretion by making damages findings, including the finding in ¶ 34, without allowing petitioner to put on its damages case. That issue has no effect on this petition.

Respondents' apparent purpose in raising this question is to persuade this Court that there are prudential reasons for denying the petition for certiorari. Since this question was raised on appeal and pretermitted because the *Robins* ruling made decision of it unnecessary, the Ninth Circuit would be required – and hence able – to review the finding in paragraph 34 on remand. This issue is not a basis for denying this petition.

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[41] *See* the Appendix to this reply brief, which contains the applicable pages from the Brief of Appellant that petitioner filed in the court of appeals.

[42] The court of appeals recognized that the trial was bifurcated into liability and damages phases, and that the court entered judgment after petitioner rested its liability case. Pet. for Cert. at App. 4.

[43] Pet. for Cert. at App. 6.

CONCLUSION

This is not a fact-bound case, and there are no prudential reasons for denying the petition. The conflict in the circuits and particularly the 24-21 division among appellate judges deciding the issue presented for review are strong recommendations for granting the writ. The judicial and academic attention focused on the *Robins* bright-line rule demonstrate the significance of the issue. Some of the flaws in the rule were revealed in a recent article in *The Journal of Legal Studies* by Victor Goldberg, the Thomas Macioce Professor of Law and Economics and codirector of the Center for Law and Economic Studies at Columbia University.[44] According to Professor Goldberg:

> The *Robins* rule is overbroad, lumping together a number of very different problems. Many of the claims barred by the economic loss doctrine are easily distinguishable from *Robins*. Of course the *Robins* rule need not give the wrong result in other cases of economic loss, but the doctrine gives no guidance as to why liability should be denied and fails to identify cases in which denial of recovery for economic losses is the wrong outcome.[45]

Pointing out that the *Robins* case "differs fundamentally from the bulk of the cases that raise the economic loss question,"[46] Professor Goldberg concludes that "the rule has to be rethought. We require some intellectual

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[44] Victor P. Goldberg, *Recovery for Pure Economic Loss in Tort: Another Look at* Robins Dry Dock V. Flint, 20 J. LEGAL STUD. 249 (1991).

[45] *Id.* at 249-50.

[46] *Id.* at 275. "To decide that, say, Exxon should not have to compensate Alaskan innkeepers because Robins did not have to compensate Flint is a non sequitur." *Id. Compare* Pet. for Cert. at 10, text at n.27.

apparatus for evaluating the myriad of claims for recovery of mere economic loss."[47]

Petitioner submits that the *Robins* decision and its expanded application by the First, Third, Fifth, Ninth and Eleventh Circuits have failed to provide the requisite intellectual apparatus for evaluating economic claims. This Court can, and should, provide this apparatus by taking up, on this petition, the issue reserved in *East River*: whether a tort cause of action can be stated in admiralty if the only damages sought are economic. This case is particularly well-suited for the decision of this issue because, unlike the time-charterer in *Robins*, petitioner is claiming for the loss of use of its own property. This case would thus permit this Court the full range of possible outcomes, from endorsing the expansion of *Robins* to overruling *Robins* and the cases based upon it, including the middle approach of draw the line at proprietary interest rather than physical damage. The facts of this case would enable this Court to allow economic recovery for the loss of use of one's own property while retaining the *Robins* bar in the absence of a proprietary interest.

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Respectfully submitted,

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[47] Goldberg, *supra* note 44, at 275.

APPENDIX

ISSUE III: THE COURT RULED ON DAMAGES WITHOUT TRIAL OF DAMAGES

The district court ordered the trial bifurcated (RE 3, ll. 22-25), with damages to be tried only after a determination that defendants were liable. The eight days of trial were devoted exclusively to the liability phase of the case. As a result, the only evidence relating to damages which the bifurcation order allowed plaintiff to put on was evidence showing the categories of damages claimed, so the court could decide the *Robins Dry Dock* issue that defendants had raised repeatedly throughout the six years of this case. Despite the bifurcation, the court made findings that the damages evidence was inadequate and the costs incurred by National Seed to cover for the delayed delivery were unreasonable or unnecessary.

Because of the bifurcation order, all these damages findings were erroneous. The court erred in making findings of any kind with respect to the reasonableness of National Seed's efforts to mitigate its damages by buying grain in the Saudi market and converting it to wheat seed to cover its contracts for the tonnage that would be arriving too late aboard the M/V SINGAPORE VICTORY. All of National Seed's decisions and actions in this respect are matters of *quantum* and *mitigation*. Even the court's finding in RE 43, ¶ 38 that the import deadline was extended to December 20, 1988 – a finding which ignores the fact that the Kingdom of Saudi Arabia granted this extension as an alternative to letting the 10,000 late-delivered tons of wheat seed rot on the dock –

goes to the question of whether the damages were reasonable in the circumstances, a question the court could not decide unless it first permitted trial of the damages phase of the case.

In making findings about damages, the court ignored its bifurcation order, which ordered plaintiff *not* to put on any evidence of reasonableness or mitigation in the liability phase of the trial. Counsel reminded the court of the bifurcation order shortly before the court stated its reasons orally for dismissing the entire complaint. When the court commented that some damages evidence had been heard through the deposition of the general manager of National Seed, counsel explained that the only damages evidence put on in the liability phase of the trial was evidence to establish the "categories of damage" sustained by National Seed. *See* TR, Feb. 16, 29/6 - 31/11. The purpose of demonstrating the categories of damages was to show *causation*, not quantum, and certainly not mitigation. At that point, the court acknowledged the bifurcation order, assuring counsel that:

> In the findings I will now articulate – damages will not be discussed except, perhaps, I might allude to the – I will allude to the assignment, and I might allude to the evidence of National's claims. But I say this, knowing full well that damages – somewhere in the distant remote past we bifurcated damages from liability. Yes, I thank you for bringing that to my attention. But I, too, became aware of the problems that emerged, because of some of the comments I made about lack of evidence and damage.

TR, Feb. 16, 30/25 - 31/9.

Despite the recognition that damages were not to be tried in this phase of the trial, the court went on to make numerous damages findings. *See* RE 38-40, ¶¶ 20, 21, 22, 23, 24, and 34, and RE 43-44, ¶¶ 36, 38 and 39, of the Findings of Fact and Conclusions of Law. In some of those findings, the court – incredibly – went so far as to say that no evidence was presented on particular damages issues! *See* RE 38, ¶¶ 20 and 22. Findings of Fact ¶¶ 20, 21, 22, 23, 24, 34, 36, 38 and 39 were made without allowing plaintiff to try damages, a clear abuse of discretion.

These findings should also be reversed because the court, in effect, required the plaintiff to bear the burden of proof on mitigation, a patent legal error. The burden falls squarely on the defendant to prove failure to mitigate. *Alexander v. Menlo Park*, 787 F.2d 1371, 1375 (9th Cir. 1986), *cert. denied*, 479 U.S. 1032, 107 S. Ct. 879, 93 L. Ed. 2d 833 (1987). *See also Jones v. Consolidated Rail Corp.*, 800 F.2d 590, 593-94 (6th Cir. 1986). The burden is also on the defendant to show that the plaintiff "failed to exercise reasonable business prudence" in reacting to a loss. *United States v. Harris*, 100 F.2d 268, 279 (1938), *reh'g denied*, 103 F.2d 1020 (9th Cir. 1939). Without permitting trial of damages, the court held that appellant had not carried appellees' burdens.